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NONDEVELOPMENTAL ITEMS ACQUISITION ACT OF 1989

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

S. 1957

TO PROVIDE FOR THE EFFICIENT AND COST EFFECTIVE ACQUISITION OF NONDEVELOPMENTAL ITEMS FOR FEDERAL AGENCIES, AND FOR OTHER PURPOSES

APRIL 26, 1990

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NONDEVELOPMENTAL ITEMS ACQUISITION ACT OF 1989

THURSDAY, APRIL 26, 1990

U.S. SENATE, SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, COMMITTEE ON GOVERNMENTAL AFFAIRS,

Washington, DC.

The Subcommittee convened, pursuant to notice, at 2:07 p.m., in room SD-342, Dirksen Senate Office Building, Hon. Carl Levin (chairman of the Subcommittee) presiding.

Present: Senators Levin and Cohen.

Staff Present: Linda J. Gustitus, Staff Director and Chief Counsel; Peter K. Levine, Counsel; Frankie de Vergie, Chief Clerk; Mary B. Gerwin, Minority Staff Director and Chief Counsel to the Minority; Lisa Baldacci, Minority Counsel; and Kenneth Grossfield, Intern.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Good afternoon, everybody.

We are here today to consider S. 1957, a bill to increase the purchase of commercial products by civilian agencies, which I introduced last November with Senators Cohen, Glenn, and Roth as cosponsors.

For several years now, we have worked together to encourage the Department of Defense to stop spending taxpayer dollars to design and build new products when available products could meet the Department's needs. It only makes sense that products that are already in use—known as "non-developmental items" or NDI's—are cheaper and easier to purchase than new Government-unique items. For example, it is a lot easier to order a standard heat pump from an existing manufacturer than it is to design and build new ones from scratch for the Federal Government alone.

Unfortunately, Government acquisition systems, with their complex specifications and burdensome regulations, pose substantial barriers that can discourage commercial manufacturers from selling to the Government.

DOD is not the only Federal agency that discourages such purchases by imposing inappropriate and burdensome requirements on contractors. Many of the same contract requirements that have been identified as impediments to the purchase of NDI's by DOD apply to other Federal agencies, as well. Moreover, numerous contractor representatives have indicated to our staff that they have the same problems trying to sell NDI's to civilian agencies that

they have experienced with the Department of Defense and we expect to hear testimony to this effect later today.

The Competition in Contracting Act and the Federal Acquisition Regulation establish the principle that we should have a single, uniform Federal contracting system. Since CICA was enacted in 1984, Senator Cohen and I have worked together to ensure that this uniformity is maintained.

S. 1957 would require civilian agencies to take the same steps to encourage the acquisition of NDI's that are already required of the Department of Defense under the 1987 and 1990 Authorization Acts. These streamlining measures make sense for the Department of Defense and they make sense for other agencies, as well.

I look forward to the testimony of our witnesses on these provisions this afternoon and on any other proposals that they may have for easing the barriers to the procurement of commercial and off-the-shelf products by Federal agencies.

[The statement of Senator Levin follows:]

PREPARED STATEMENT OF SENATOR LEVIN

We are here today to consider S. 1957, a bill to increase the purchase of commercial products by civilian agencies, which I introduced last November with Senators Cohen, Glenn and Roth as co-sponsors.

For several years now, we have worked together to encourage the Department of Defense to stop spending taxpayer dollars to design and build new products when available products could meet the department's needs. It only makes sense that products that are already in use—known as "nondevelopmental items" or "NDIs"—are cheaper and easier to purchase than new, government-unique items. For example, it is a lot easier to order a standard heat pump from an existing manufacturer than it is to design and build new ones from scratch for the Federal Government alone.

Unfortunately, Government acquisition systems, with their complex specifications and burdensome regulations, pose substantial barriers that can discourage commercial manufacturers from selling to the Government.

After years of frustrating inaction, we are finally getting some progress from DOD. In 1987, we enacted a provision—Section 907 of that year's DOD Authorization Act—which required DOD to simplify its product specifications so that they could be met by NDIs wherever possible, and to identify and remove impediments to the acquisition of such NDIs. Last year, we enacted an additional provision, which requires the Department to simplify contract provisions and eliminate burdensome paperwork requirements in commercial purchases.

However, DOD is not the only Federal agency that discourages such purchases by imposing inappropriate and burdensome requirements on contractors. Many of the same contract requirements that have been identified as impediments to the purchase of NDIs by DOD apply to other Federal agencies as well. Moreover, numerous contractor representatives have indicated to our staff that they have the same problems trying to sell NDIs to civilian agencies that they have experienced with DOD. We expect to hear testimony to this effect later today.

The Competition in Contracting Act and the Federal Acquisition Regulation establish the principle that we should have a single, uniform Federal contracting system. Since CICA was enacted in 1984, Senator Cohen and I have worked together to ensure that this uniformity is maintained.

S. 1957 would require civilian agencies to take the same steps to encourage the acquisition of NDIs that are already required of DOD under the 1987 and 1990 Authorization Acts. These streamlining measures make sense for DOD, and they make sense for other agencies.

The bill would promote the acquisition of NDIs by requiring agencies to:

(1) Purchase NDIs to the maximum extent possible;

(2) Simplify their product requirements, telling companies what they want, rather than how to build it;

(3) Eliminate unnecessary and burdensome contract clauses that serve as an impediment to NDI contracts;

(4) Tailor appropriate inspection requirements for NDIs;

(5) Reduce paperwork requirements for contractors in NDI contracts;
(6) Enhance training for acquisition personnel in the procurement of NDIs; and
(7) Designate officials responsible for promoting the acquisition of NDIs.

I look forward to the testimony of our witnesses on these provisions, and on any other proposals they may have for easing barriers to the procurement of commercial and off-the-shelf products by Federal agencies.

Senator LEVIN. Now let me call upon Senator Cohen, who has been the leader in so many of these efforts that I have mentioned in my opening statement.

Senator Cohen?

OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. Thank you, Mr. Chairman.

Ladies and gentlemen, I will not take the time to read the full statement that I have, but let me try and just summarize a bit of what Senator Levin and I have been trying to do.

We held a number of hearings last year with respect to the Department of Defense. We finally tried to identify ways in which we could help the Department of Defense simplify their procedures to allow the purchase of commercially produced items at great savings to the taxpayer.

We found, for example, a situation in which we had a 14-page military specification for a chocolate chip cookie. We found packaging specifications for an O-ring which made the box itself cost $2, while the O-ring only cost 5 cents.

We had a situation in my own State of Maine in which a glove company found it too expensive to supply dress gloves to the Government, because the Government required a special stitching machine that was not available in the commercial glove industry itself. The company told me they could have cut the costs to the Defense Department by 20 to 30 percent, without any loss in quality. We are not talking about fighting gloves now, we are talking about dress gloves for the military.

We also heard examples where the Government was buying tool kits to fix phones that would pull vacuum tubes out of phones, but we have not had vacuum tubes in phones for years. So, that was some of the testimony that we were listening to and reviewing, to see whether or not we should find ways to encourage off-the-shelf purchasing.

We had a hearing this year, actually earlier this week, in an Armed Services Committee at which found the Defense Department has yet to implement any of the recommendations that we have proposed.

What was even more disturbing was that the administration's response of how to encourage more commercial acquisition in the Department of Defense was do not reform or simplify the regulations, do not move in swiftly on procurement personnel to purchase off-the-shelf equipment or to simplify the specifications, not even to identify which laws and regulations pose the greatest obstacles. Instead, the Administration response was simply repeal almost all of the procurement laws for commercial acquisition.

I must tell you that we met with some disbelief, certainly on my part, and at least skepticism on the part of others that have been

involved in a host of what we consider to be procurement reforms over the years, such as competition in contracting.

Ironically, competition in contracting is now cited as one of the obstacles to the purchase of off-the-shelf items. It is cited as one of the obstacles that the Defense Department finds in its dealings with manufacturers. In fact, competition in contracting has saved millions, indeed billions of dollars to the taxpayers. That is one measure that Senator Levin and myself have been involved with, competition in contracting. Others are, the bid protest procedures, Anti-Kickback Act of 1986, the Program Fraud Civil Remedies Act, the procurement integrity and conflict of interest laws all of them are in place to protect the taxpayers' dollars from wasteful and inefficient and even fraudulent contract practices.

So, we found the recommendation to simply sweep these aside, to create total exemptions from the application of yet unidentified laws, was not something that we could lend our support to, at least at this point.

There is a fear that it could lend itself to the return of the situation where we are purchasing toilet seats for $640 apiece, $7,600 for one of the coffee makers onboard an Air Force aircraft, and more specifically, it could in fact bring a return to the kind of practice that we thought we had gotten away from. That was a situation in which we found that Defense Department employees were moving out of the Defense Department into the private sector, taking jobs with major contractors and then working sweetheart deals back with the very offices from which they came.

All of that I think the American public found to be offensive, to say the least, and we thought we had tried to propose some responsible legislation to deter that.

Today, we are going to examine what needs to be done to encourage the purchase of more commercial products beyond the Department of Defense, to all of the other Government agencies. Since our last hearing, we have heard concern expressed by a number of commercial vendors that they meet the same obstacles when they try to sell to other parts of the Federal Government. So, I think it is important that we try to simplify and also to have a uniformity of application to the extent that we can. That is the purpose of the hearing today and we look forward to all of your testimony.

Thank you, Mr. Chairman.

[The statement of Senator Cohen follows:]

PREPARED STATEMENT OF SENATOR COHEN

Mr. Chairman, I thank you for holding this hearing on S. 1957, legislation which you and I introduced, along with Senator Glenn and Roth, to encourage Governmentwide purchasing of commercial products.

The Congress has clearly expressed its will that the major purchasing department in the Federal Government—the Department of Defense—expand its use of so-called "off-the-shelf" items in its procurements. Last year, this subcommittee reviewed how much progress the Department has made to date in promoting the purchasing of commercial products. What we found was most disappointing. We found that substantial impediments to the acquisition of commercial products by DOD still exist, and that the Department of Defense has done little to implement a 1986 mandate from the Congress to remove these obstacles to purchasing off-the-shelf.

We found disturbing examples of not buying commercially available products: A 14-page military specification for a chocolate chip cookie, packaging specifications for an O-ring which makes the box itself cost $2 while the O-ring costs only 5 cents.

In my State of Maine, I found a glove company that found it too expensive to supply dress gloves to the Government because the Government required a special stitching machine that was no longer available in the commercial glove industry itself. This company told me that it could have cut the cost of gloves for the DOD by some 20 to 30 percent without any loss of quality. I have also heard that the Government buys only tool kits to fix phones that will pull vacuum tubes out of the phones, but that we have not had vacuum tubes in phones for years.

To spur the Department of Defense into action, the subcommittee made 16 recommendations on how the obstacles to purchasing "off-the-shelf" items to meet DOD needs could be removed. Many of the recommendations were included in last year's Department of Defense Authorization Act.

As Senator Levin and I heard earlier this week at an Armed Services Committee hearing, however, the Department of Defense is still far behind in its efforts to increase the purchase of commercial products. Even more disturbing is the administration's response on how to encourage commercial acquisition, at least in DOD, namely, don't reform or simplify the regulations, don't move swiftly on training procurement personnel to purchase off-the-shelf or to simplify specifications, don't even identify which laws or regulations are the greatest obstacles. Instead, simply repeal most of the procurement laws for commercial acquisition.

I have grave concerns that this sweeping approach is akin to throwing the baby out with the bath water. A host of procurement reforms that this subcommittee has been involved in over the years, such as the competition in contracting act, the bid protest procedures, the Anti-Kickback Act of 1986, the Program Fraud Civil Remedies Act, the procurement integrity and conflict-of-interest laws, are in place to protect the taxpayers' dollars from wasteful, inefficient, or even fraudulent contracting practices.

To create sweeping exemptions from these laws, even for the important goal of encouraging commercial acquisition, could bring a return to the days of the Government purchasing toilet seats for $640 a piece, or a coffee maker for $7,600. It could also bring a return to the days of the sweetheart deals between the Government and certain preferred contractors. The better course, in my opinion, is to fine-tune, not to radically reverse, the procurement reforms of the last decade.

Today, we are here to examine what needs to be done to encourage more purchasing of commercial products beyond the Department of Defense, to all other Government agencies. Since our last hearing, we have heard concerns by commercial vendors that they meet the same obstacles when they try to sell to other parts of the Federal Government: Excessively detailed specifications, noncommercial contract clauses, excessive rqeuests for cost data, and contracting officers who are unfamiliar with buying off-the-shelf.

Discouraging vendors to do business with the Government through arcane specifications, and mazes of contract clauses serves no one at all, not the small business which wants to do business with the Government, not Government agencies which could have state-of-the-art equipment delivered to them faster and more efficiently, and especially not the taxpayer, who ultimately pays the price for overspecified items that could have been brought at a much lower price.

I believe that the provisions of S. 1957 are a good starting point for removing some of the barriers to purchasing off-the-shelf. We must, of course, be careful not to overreact, and eliminate necessary safeguards to ensure that the Government is not being overcharged or defrauded by its suppliers. What it will take is for the Congress, the administration, and the industry to work together to identify the greatest obstacles of buying commercially and to craft a balanced solution to this problem.

Senator LEVIN. Our first witness is Dr. Allan Burman, who was recently confirmed as the Administrator of the Office of Federal Procurement Policy.

Dr. Burman, if you can come forward, we would appreciate your testimony.

Senator COHEN. We should indicate, Dr. Burman, that you owe your position to this Committee. [Laughter.]

There has been a persistent effort over the years to abolish the OFPP.

Dr. BURMAN. I am certainly aware of the Committee's support and grateful for it, as well.

Senator COHEN. I do not want to color your testimony at all, but——

Senator LEVIN. I do, but he does not. We definitely do want to color your testimony. [Laughter.]

Dr. BURMAN. I think it will be difficult to rewrite it at this time, but nevertheless——

Senator LEVIN. As you know from your confirmation, we look forward to your objectivity and we would protect it even against ourselves.

TESTIMONY OF ALLAN V. BURMAN, Ph.D, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET,[1] ACCOMPANIED BY ALLAN BROWN, DEPUTY ASSOCIATE ADMINISTRATOR

Dr. BURMAN. Thank you very much, I appreciate that warning, I think.

Mr. Chairman and Senator Cohen, I am very pleased to be here today. I am accompanied by Allan Brown. Allan is a Deputy Associate Administrator in OFPP and the Acting Commercial Products Advocate, so I asked him to come along with me.

I should say first, before going into the discussion on the commercial products bill, that my daughter Zoe was very much delighted with the attention that her name received at my confirmation hearing and she wanted to be sure that she would send her best back to the Chairman and the Committee, so I told her I would do that as well.

Senator LEVIN. Say hello to her.

Dr. BURMAN. I will do that.

What I plan to do today is to talk about S. 1957, the Non-Developmental Items Acquisitions Act, as well as other efforts to improve commercial product procurement and also the multiple awards schedule.

I do have an extremely lengthy statement as opposed to a very lengthy statement at this time and I would like to submit that for the record and then briefly summarize it, if I may.

Senator LEVIN. Your statement is not quite as long as the Code of Federal Regulations, but because it is not quite that long, it will be made a part of the record.

Dr. BURMAN. Thank you very much.

First, I would like to make some general points about this issue. It does seem to me, when so many people believe that it makes sense to buy commercial products and so many commissions and study groups have come out and recommended it and said that we should do it, the obvious question is why have we not done it. I do think that some of the problems that we are dealing with here are procedural and I would like to talk a little bit about some of those.

I saw from your hearings that you held last spring, many people in industry complained about over-specification and we discussed that at the confirmation hearing, as well as intrusive auditing requirements as well.

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[1] See p. 52 for Dr. Burman's prepared statement.

On the other hand, Government officials complain that they cannot get these commercial products very quickly and that they do not have enough leeway to look to quality factors, such as performance or reliability over price. I think when CICA was set up, it clearly looked at a way to try to let people procure items based on quality and needs factors, but it does not seem like it is being done, I agree with you on that point.

I think there has been a kind of traditional fear that if the contracting officers interact too closely with industry, that they will be subject to bias in their decision-making and the process will be more subject to abuse. It seems to me that the easiest approach for someone in this business to avoid anyone's criticism is to lay out the requirements for whatever it is that they want to buy in the minutest detail, so that anyone who wants to build to these requirements can participate. That is certainly consistent with full and open competition and no one could then criticize you on your judgment, because you are basically going to buy the item that is the lowest price item, and so that is really the only decision that needs to be made.

Senator COHEN. Is it your judgment that the Government is required to give a contract to the lowest price bidder?

Dr. BURMAN. It is not my judgment that the Government is required to do that, but I am expressing what seems to be happening in practice, as opposed to what may be allowed.

On the commercial side, however, it seems not minimum needs, but innovation is rewarded and firms benefit from anticipating customer needs, rather than responding to minimum needs requirements.

I believe that CICA did make it much easier to look to quality as well as price, but what we are suggesting here is that perhaps we need to go a little bit further, still in keeping with a full and open competition mandate that was so essential to that legislation.

Secretary Cheney's Defense Management Review package does have one section, section 202, that we believe does move in that direction. It is a product that we have been working on for over two years with Defense and with the General Services Administration and some of the other agencies. Some of the key features of that particular proposal is that it relies on products' demonstrated success in the market in place of detailed specifications, inspection and testing. It integrates market research into the specification writing process, by allowing officials to modify specifications after viewing what the market has to offer. It lets lists of pre-evaluated products be routinely established and it permits contracting officers to award contracts to other than the lowest price offeror, without conducting further discussions.

I have provided in the written testimony some examples of how we believe the bill would work. We talked about toasters and fuel oil. Basically, the kinds of steps that we are looking at would be for the contracting officer to see if suitable products are competitively available and that they are sold in significant quantities in the marketplace.

The contracting officer would develop a product description to be advertised in the Commerce Business Daily, including a deadline for offerors to describe their product. The solicitation would state

very clearly the evaluation criteria to be used, so that there is no question about what people would be making judgments on.

Section 202 would, however, allow the contracting officer to further refine specifications later on—after advertising for interested sources. For example, in the toaster example we used, he might have said we need something to toast bread, a subsequent decision might be that four-slice toasters are better than two and that is what we are looking for. Finally, the decision would be made solely on the evaluation factors in the solicitation, just as is the case with CICA.

Now, let me briefly compare some of these section 202 procedures with some of the ideas presented in S. 1957. It seems to me very useful to have a model contract, as S. 1957 calls for, to know what clauses make sense for commercial products. I believe that the procedural reforms we are suggesting go hand-in-hand with that proposal. We certainly agree that the performance of functional specifications is essential, as called for in S. 1957.

S. 1957 also makes it more difficult to require cost and pricing data for commercial products. Again, we believe that makes good sense. However, we would expect that the section 202 provisions that we are discussing, would only be used for competitively available products, and we would hope that there would be no need for any kind of data whatsoever, since adequate price competition would exist.

In sum, I believe that our efforts are both consistent and complimentary. There are some other features of the Defense Management Review commercial products proposal that I would like to mention. I believe it would help small businesses, by relieving contractors of many of the requirements that are placed on them solely because the government is the buyer and it would eliminate considerable red tape.

However, I should note that it does nothing to existing small business goaling requirements that the agencies set and try to carry out. It does also include a 3-year test for selected components of the Defense Department to use an intra-agency protest mechanism when firms believe they have not been fairly treated.

Finally, you asked our views on the multiple awards schedule. We have certainly heard many complaints from industry that the data burden from that schedule is too great. Of course, we are familiar with many of the problems that occurred in the late 1970's and early 1980's that led to this set of requirements. We really do not have a solution to that at this time, but we would be happy to work with the committee and Dick Austin and GSA to see if we can make some improvements here.

This is a very quick run-through of a very lengthy statement, but in summary, I would say I believe we have common goals and we would very much like to work with the committee to see if we can together achieve the significant reforms needed, so that the Federal Government can take advantage of a large commercial market available to it.

Mr. Chairman and Senator Cohen, this concludes my prepared remarks and I would be happy to take any questions you might have.

Senator LEVIN. Thank you, Dr. Burman.

Your proposal for commercial-style acquisition procedures has some interesting approaches, but I am not convinced that they require the kind of broad exemption from existing procurement statutes that your proposal provides. As a matter of fact, I am very much concerned that your proposal could undermine a lot of provisions in our laws which provide essential protections to taxpayers from excessive spending for procurement.

Let me just give you some examples. You exempt your commercial purchases from the Competition in Contracting Act in its entirety. In your prepared statement, you point out that the overspecification and burdensome data requirements are "symptoms of an underlying problem arising from an over-regulated contracting process that mandates rigid procedures for how to conduct competitive procurements," and then you identify CICA as the main impediment to commercial-style acquisition procedures.

Now, I happen to agree with you that the contracting process is overregulated, it is burdensome and it is a real impediment to the acquisition of commercial products, but I do not agree with you that CICA is the main problem or even a major problem in this regard.

This is CICA. It is about 30 pages long. The Federal Acquisition Regulation and the agency supplements to those regulations are 7 books like this, 5,300 pages of regulations. So, you have got a 30-page statute and you have got the 5,300 pages of regulations, and I think most of the problems that you identify are in these regulations, not in that statute, and can be corrected by modifying the regulations.

I do not believe CICA or any other law requires that commercial product procurements be handled in the same manner as government unique procurements. I do not believe CICA or any other law precludes agencies from conducting market research surveys to determine what commercial products may be available to meet their needs.

I do not believe CICA or any other law precludes government agencies from considering past quality records, high performance, increased reliability or other quality-related factors in making award decisions and, from your answer to Senator Cohen's question, I think you probably agree with that.

CICA does not require the use of highly detailed design specifications for commercially available products, and does not preclude the Government from limiting competition to products that have already been developed and are already available for government use. It does not preclude the Government from limiting competition to products that have been developed and are already available, and it does not preclude agencies from using market acceptability as a prerequisite to competition.

What CICA does do is require the use of competitive procurement procedures, whenever possible, and to give private parties the right to file bid protests. Those are essential protections in the Federal contracting system and I believe we should be careful about tinkering with them.

Again, I think the real problems that we have in the procurement area are thousands of pages of procurement regulations and millions of pages of product specifications that just have gotten out

of control. It is easy to point to CICA as being the source of the problem, but I do not think it is.

First, let me get to my questions. You would use market acceptability as a requirement in your commercial product procurements, and you indicate in your written statement that "some of the procurement community continues to doubt whether commercial market acceptance can be used as a criterion for initially screening products, consistent with CICA's full and open competition mandate."

Last year, Department of Defense witnesses raised the same complaint in testimony before this Subcommittee. At that time, Senator Cohen characterized that position as nonsense. I happen to agree with Senator Cohen. The Department of Defense went back and looked at the issue and concluded that they had been wrong and that CICA did not preclude the use of market acceptability as a precondition to bidding and this history was detailed in our subcommittee report on commercial products which we issued just six months ago.

I am wondering whether or not you are familiar with that report, with the Department of Defense conclusion that CICA is not a barrier to the use of market acceptability requirements.

Dr. BURMAN. I am familiar with the report and I did read the report of the hearings last spring. It does still seem to me that there is a reluctance to make use in practice of that approach, and I think that perhaps some additional clarification may be necessary. It does not seem like that is getting through to the people who are out there buying commercial products.

The concern would be that what we are looking at is some kind——

Senator LEVIN. You do not have to have an exemption from CICA to get a message through that CICA does not preclude something. You can just send out notices to folks saying proceed, CICA is not a barrier. Why do we have to amend a statute that does not preclude it?

Dr. BURMAN. If I may, just to go back to the earlier point that both you and Senator Cohen made, this effort that we put together in this bill—and as I said, it is something that we have worked on for a long time—was designed and modeled on all of the provisions in CICA. We looked at market research, we looked at making sure notices were out, we tried to make sure that there was going to be open competition, that people knew what the evaluation criteria were going to be when solicitations were sent out.

So, rather than saying that what we tried to do here was to eliminate CICA or waive CICA, what we tried to do was to take CICA and apply it in this particular area and basically use the CICA framework for commercial products, to make some things perhaps a little more explicit than they might have been in CICA.

So, I certainly would not in any sense want to characterize what we were doing here as an attempt to do in CICA. That is far from any notion that we had in mind.

Senator LEVIN. But when you list CICA as the impediment, when it is not the impediment, you are helping to do in CICA and I think you agree, at least on this particular issue, that CICA does not pre-

clude the use of market acceptability requirement, is that correct? Do you agree with that?

Dr. BURMAN. I agree that it may not preclude it. My concern——

Senator LEVIN. Not may not. Does it preclude it or does it not?

Dr. BURMAN. Let me frame a question to you, if I may, for——

Senator LEVIN. No, I would rather the questions be fired at you. Do you believe that CICA precludes the use of market acceptability?

Dr. BURMAN. I believe it does not preclude the use of market acceptability, but there is——

Senator LEVIN. Are you—go on.

Dr. BURMAN. If I may just elaborate on that point, there are situations that we are looking at in the commercial products world, for example, where you might say you would like to buy an item that is only available from a firm that is selling it to everybody else in the country, and someone writes in and says, "Well, we can design that and make that item and we can sell it to you and we can sell it to you cheaper, even though we have never sold it to anybody else."

The question there is how do you deal with that particular offeror in a situation where you would like to buy a commercial product. That offeror can claim—if you say that competition is full and open and this person says that he has a right to bid and can bid and should be able to bid, then it seems to me that we are creating some ambiguities here. I guess the only point that I am making in this legislative package, as we have laid it out, is to try to make it very clear that if an item is competitively available and sold in significant quantities, then that clearly falls within the purview of the law and other things do not.

Senator LEVIN. You are creating the ambiguity, I am afraid, perhaps unwittingly. If you have a market acceptability requirement, then that does it and that requirement is consistent with CICA, so that is it.

Dr. BURMAN. That is what I was told, but——

Senator LEVIN. You do not have to amend CICA, by your own legal opinion, by DOD's legal opinion, it does not require an amendment, so you can get on with it without pointing a finger at CICA.

Dr. BURMAN. Again, I——

Senator LEVIN. I would suggest that we get on with it.

Dr. BURMAN. I would——

Senator LEVIN. As a matter of fact—I am sorry.

Dr. BURMAN. I would like to get on with it as well. That is why I am suggesting that perhaps if we do not need to make the legislative change, that we need to make some additional clarification. We do not seem to be getting on with it and so I am trying to figure out a way to try to do that as well.

Senator LEVIN. There was an effort to get on with it. There was a Katzen memorandum and a task group in the Department of Defense and that was an effort to get on with it, as I understand. What happened to that? That is three months ago now, January 2, 1990. Mr. Katzen writes that there is no prohibition in CICA. Some have interpreted, he wrote, full and open competition as precluding

the use of market acceptability as criteria for acceptance of an offer. This interpretation does not reflect the intent of CICA.

Now, that is what he wrote. He said I am directing a task group to develop by January 31, 1990, implementing guidance for using a CID, combined with market acceptability criteria that can be applied consistently to as many items as practical.

Did you participate in this or are you aware of this?

Dr. BURMAN. My staff did participate in that effort. I am familiar with the effort, as well.

Senator LEVIN. And can this be made a Governmentwide project?

Dr. BURMAN. We certainly could.

Senator LEVIN. Do you intend to?

Dr. BURMAN. Well, I am not sure.

Senator LEVIN. Well, if you are not sure, you can let us know. I do not want——

Dr. BURMAN. I mean I would like to refresh my memory on that particular document and what it said. We certainly have the same goals in mind here. So if we can clarify what is allowed, to make it clear that these sorts of things are allowed, that is in our interest, clearly.

Senator LEVIN. Why don't you take a look at that and let the Subcommittee know whether or not you will make this a Governmentwide project.

Dr. BURMAN. Fine.

Senator LEVIN. If you are not sure, I am not trying to get you to say you are not sure, if you are not sure.

Dr. BURMAN. I have always been told to make sure I read what I agree to, so I suspect I would like to read that carefully before I——

Senator LEVIN. The one thing you probably will not be able to agree to is to develop by January 31, 1990, the implementing guidance, for instance.

Dr. BURMAN. That sounds safe to me.

Senator LEVIN. We pressed the DOD on what happened to that. The answer we got was, "Well, it's complicated."

One other question and then I will turn this over to Senator Cohen.

You also proposed to use procurement notices that contain general product descriptions to enable agencies to determine what commercial products may be available to meet their needs before they put together a specification. And I am wondering, can agencies do that now under existing law?

Dr. BURMAN. Well, I think there is a concern that if agencies do that and then revise the specifications later, that there is some question about that, without having discussions with all of the various parties. So, I think this would ease that process.

Senator LEVIN. And has any lawyer or legal division or legal opinion told you that that cannot be done under existing law?

Dr. BURMAN. Allan?

Mr. BROWN. The one thing I would like to add on that, what we cannot do today is we cannot ask people to tell us about their products and then establish a field of competitors at that point and then, looking at that field, develop specifications and evaluation criteria to differentiate amongst quality factors and price and get

us to a tradeoff. We need to be able to say to people, here is our general notice, come in, who is interested, who are interested competitors, and then, looking at that field, we need to then move on with the specifications development.

Today, if you do that, you are going to run into accusations of bias and I believe you are going to run into accusations that you are not consistent with the minimum needs model that CICA was based on still and did not change.

There was a recent article by Professors Nash and Cibinic stating that we need to stop talking about minimum needs. They suggested that we should have dealt with that in CICA. We did not deal with it and I am saying let us move off minimum needs here, let us talk about the field of competitors, let us talk about quality and talk about refining specifications and evaluation criteria before we draw up solicitations.

Senator LEVIN. Is there a legal problem, though, specifically with agents conducting market research surveys and using the knowledge of what is available to help them define their needs? That is a specific question.

Mr. BROWN. No, there is no legal problem there.

Senator LEVIN. Senator Cohen?

Senator COHEN. I would like to just examine the hypothetical that you have mentioned. Suppose you have got a request out for a certain product and there is only one company currently in existence that makes this particular product and you put out a notice that you are soliciting bids for such a product.

Y Company shows up and says, "Wait a minute, I can build this product, I've got the manpower, labor force, et cetera, expertise, I can build it, I can build it cheaper than my competitors." Now, do you have a problem with that? You cite that as an example of the problems involved in competition in contracting.

Now, if I were a contracting officer, I would say, "Wait a minute, how long has Y Company been in existence, what is your capital structure, what kind of products have you made in the past, what is your record with respect to success in the marketplace, what kind of a track record are you running now in terms of your debts," and so forth. I would think that a contracting officer would take a look at that and say, "I'm sorry, you are not going to be allowed to bid on this particular item, you are going to be cut out of the competition."

Now, do you find that to be a practice which is not followed today?

Dr. BURMAN. The concern would be that somebody coming in very late would say we can do that and the contracting officer would have to delay, go through the process to insure that all of this takes place, and so it becomes a timing question.

One of the main reasons why one wants to buy commercial products is to say we can go out there and buy this, we do not have to wait for 8 months for somebody to define specifications and what have you.

Senator COHEN. Is time one of the factors that is permissible under the CICA Act itself?

Dr. BURMAN. You can make a decision and there are certainly exemptions in CICA for someone to make a decision in a particular

case, but here we are talking about broad categories of things and doing it on a routine basis, so I do not think that you could operate that based on a one-time exemption each time some situation like this occurred. That is why we are trying to make the——

Senator COHEN. But you can have guidelines for contracting officers, say, under—within your judgment, that is why they are hired, a contracting officer to make a kind of judgment as to whether or not we need to get such and such kind of product within a certain timeframe, and he can make those kinds of judgments. If he is wrong, then I would think you could clarify that.

You stated, for example, that you do not view CICA as precluding the Government from considering quality factors, other than the lowest price, right?

Dr. BURMAN. I certainly do not, that is right.

Senator COHEN. Now, if the perception of either the agency or the contracting officer is either confused or wrong on this issue, why do you not just issue a clarification out of your office? Is that not what you are supposed to be doing?

Dr. BURMAN. We do issue many clarifications on many different matters. It seems to me that, in order to get people to recognize this it would be useful to make it very clear and make it very clear in the statute that someone is not going to come after them for using sensible business judgment.

Senator COHEN. There is no law that we can write and no regulations that you can write that can be uniform in applications in every case. You are going to have to have some discretion exercised at the contracting level. That is inevitable and——

Dr. BURMAN. Basically, what we are trying to do is encourage more discretion, this ability for contracting officers to use that discretion in this area and the sense that they will be able to do that, without being subject to later second-guessing from someone.

Senator COHEN. Well, that is completely consistent with CICA. CICA never sought to eliminate that. CICA never sought to apply an absolute across-the-board application of the lowest price, period. It was never the intent. It was not contained in the language itself. There are seven exemptions in CICA to take into account the kind of flexibility necessary, one of which is we need it, we need the product and need it now.

It is wonderful for you, Mr. X or Company X, to come here next year, after gearing up and tooling up and getting the credit and so forth to come in with this product, but we need it right now. That is totally permitted under the CICA, and I think the problem lies, again, in the need for clarification from the OFPP, that this is what we want to see.

Dr. BURMAN. My concern, on a practical matter, is that the—I am in complete agreement with that—but it does not seem like it is happening. I think we are both saying the same thing. You have a proposal here that says here are some other ways to look at it, let us see what contract clauses should be used—let us train people, so they know what they are doing, let us make it harder to get cost and pricing data. We are saying let us make it clear that you can make these decisions on what is a commercial product and do that.

I think we are really saying very similar things, but we are going about it a little differently, perhaps. But we need to have a change take place and the changes do not seem to be happening.

Senator COHEN. Apparently, you would like to allow the award of a contract without any discussions taking place, even though that contractor has not offered the lowest price, is that right?

Dr. BURMAN. Yes, that is one part of the section 202 proposal. We point out that this is a quality product and this is what we want, and we might make an award without discussions as long as, and we make it very clear in the proposal as in CICA, that the evaluation factors—and I think we could perhaps even make it more clear that the relative weighting of those evaluation factors—are to be laid out by the contracting officer, so that there is no question but that is a sensible decision. Again, these decisions would have to be justified.

Senator COHEN. To give you an example, last year we passed as part of the DOD authorization bill a limited test program to do precisely what you propose, limited to 2 years and also limited to not more than 20 percent of the contracting authority, as such, as a test program.

Do you not think it would be better to try something on a test basis, rather than come in and say, well, we think that we just want to eliminate the requirement that there be discussions?

Dr. BURMAN. We believe that it would be a useful thing to do, in just looking at the approach. Now, all of this could be presented as a test, for that matter, in terms of trying to see whether we are going to effect some results with the agencies on buying these commercial products.

Senator COHEN. I would like to raise another issue about the need for uniformity and I am going to get parochial here for a second. I talked about a glove company in Maine and we had some testimony from them last year and I want to talk about a company called the Statsburg Manufacturing Company of Stockton Spring.

Have you ever heard of Fitsbugh creepers? Do you know what an ice creeper is?

Dr. BURMAN. I am afraid I do not.

Senator COHEN. OK. I did not know the title myself until I took a look at the picture. An ice creeper is a device that you kind of strap onto your shoes or boots that allows you to walk across the ice with some safety. The company in Maine that manufactures these, they sell them to L.L. Bean, to Brookstone, to NASA, to the U.S. Fish and Wildlife Service, the U.S. Forest Service, but they cannot sell it to DOD, because DOD has a specification that requires them to use a process that goes back to 1946.

Because you have to have half-inch spikes, they have been to a steel manufacturer who says we cannot do this, certainly at that cost, and so, as a practical matter, they have been precluded from selling to DOD. In addition, the packaging requirements are so excessive that it makes it unprofitable for them to do so, even though they could save as much as 20 or 30 percent for the Federal Government.

Here is a case where something like a creeper, off-the-shelf, is purchased by commercial enterprises and also by several department agencies or government agencies, and yet is not good enough

for DOD. Now, we are not talking about landing on the moon here, in terms of what has to—I take it back, strike that. What else would NASA want these for, other than landing on the moon and walking across the surface of the Moon?

Nonetheless, here is something that seems to be very commercially available at a lower price, and yet the specifications are written in such a way that they cannot do it. So, I would suggest that is a case we have to look at.

The other thing I want to talk about is the analysis of cost data. If you have a situation in which a company has been certified by one agency, let us say NASA says the data submitted on this particular ice creeper is satisfactory. Why should they have to go through a whole series of certifications for every other department? Do you think OFPP ought to be recommending that one certification is good enough for the other departments?

Dr. BURMAN. That certainly would seem to make sense to me.

Allan, do you have a comment on that?

Mr. BROWN. The only thing is we are talking about sales data to establish prices. Now, what we are trying to do is rely on competition. We do not even want to get into——

Senator COHEN. Cost data.

Mr. BROWN. Well, cost or sales data, it is going to be current. It has to be current and I am not sure if we were to try to rely on one agency's determination, how current that is going to be for the next agency.

Senator COHEN. Well, you can write a requirement that you cannot use cost or sales data that is x number of months or years old.

Mr. BROWN. The litigation on that and the Inspector General audits on currency are very long and the stacks are high. I mean that is a very contentious issue with the audit side of the house. I mean that is a judgment, that is a business judgment. If we want to try and make that in a rule, I think it would be tough. We do not——

Senator COHEN. You do not have it in a rule now, that you could not propose that in a rule that information submitted as of 1990 no longer would be accepted automatically by another Federal agency 2, 3 or 4 years, whatever the timeframe that is identified?

Mr. BROWN. If you are talking about cost or sales or price data, things move a lot faster than that today. I mean I think, as a business judgment, you could talk about a period of reasonableness there, but I do not think auditors will ever be happy with it. You and I might come to agreement on what is a reasonable timeframe, but, again, we are talking about price or sales data—price, cost or sales data. We are talking about a commercial market, we are talking about——

Senator COHEN. Then we are back to square one, then. You are saying that each time a company has to submit all of the pricing data and so forth each time for each agency.

Mr. BROWN. What I am saying is I do not understand why we cannot base prices on competition. I mean we are talking about commercial products here. We are not talking about specially designed items, where you have to show how much things cost and what the markup is. We are talking about commercially available

items, with lots of competition. There is something wrong today that we cannot take advantage of that competition and forget about certificates for cost and pricing data.

We worked hard to try and figure out what that problem is, certainly not CICA's requirement for competition. What we are talking about with CICA are the procedures and a couple of details, and what we would like to do is engage the committee in a discussion of those details, I mean how far you can go within the current law. A lot of debate will occur about that. If we put our statute out in regulation today, I think we would be challenged right away and there would be five forums for bid protests to discuss whether it was right or not. We are talking about details at this point to rely on competition and get away from data.

Senator COHEN. So, one of your recommendations would be to eliminate the certification requirement on cost data?

Mr. BROWN. Under our provision, we would not need it.

Dr. BURMAN. For commercially available items bought in significant quantities, on the grounds that competition performs that service for the government. That is what we are looking to, the commercial market to provide us the best price we can get.

Senator COHEN. Is that in your proposal?

Mr. BROWN. Not specifically. It always has to be competitive to be considered and every buy under our proposal has to be competitive. It is announced——

Dr. BURMAN. Competitively available in significant quantities is what the definition is of what we would be able to use this proposal for, so I think that we are clearly looking at competition, again consistent with CICA.

Senator COHEN. But is it in this proposal of yours spelled out?

Dr. BURMAN. That langauge, those precise words are in this proposal, yes, they are.

Senator COHEN. And that corresponds with what the DOD submitted, in terms of spare parts? I think they confined their's to spare parts, as I recall.

Dr. BURMAN. Again, there are two different sections in the Defense Management Review package, if that is what you are mentioning, Senator Cohen. There is a section that says let us take six programs and do whatever we want with them. That is not what I am discussing. I am talking about section 202, which lays out in considerable detail the procedures that one would have to follow to try to encourage the purchase of commercial products.

Senator COHEN. Thank you.

Senator LEVIN. Picking up on that point, I believe that we made some progress on exactly that issue in last year's DOD authorization bill, is that correct?

Dr. BURMAN. Yes, I believe you did.

Senator LEVIN. Did you follow that effort on our part, to eliminate the use of cost and pricing data when we have a commercial product?

Dr. BURMAN. Right, and there is an effort going on within the Defense Department right now on revising the regulations to be consistent with that.

Senator LEVIN. Because of our authorization?

Dr. BURMAN. That is right.

Senator LEVIN. And there is a similar requirement to get rid of that cost or pricing data altogether and not construe the Truth in Negotiations Act so broadly, is part of S. 1957.

Dr. BURMAN. And we wholly support that.

Senator LEVIN. And that is part of our bill.

Dr. BURMAN. That is right.

Senator LEVIN. OK.

Now, you have indicated some clarifications necessary in terms of the issues that we talked about a few minutes ago and I agree with you, because apparently the word has not gotten down to the grass roots that there is nothing in current law which prohibits them from doing a whole number of things which you propose that we put into law as a clarification.

My question to you is, if a clarification is necessary and it can be achieved without amending laws, and if it can be achieved through administrative action, through your issuing a clear statement, why do you not issue the clarification?

Dr. BURMAN. We could certainly try to do that, but as Allan mentioned, this has been a very contentious issue among the agencies and legal questions arise with regard to it. It seems to me that if we are going to put these questions to rest once and for all, the place to put them to rest is in legislation to make it clear, but we could certainly look to doing more in that regard as well.

Senator LEVIN. I think you have agreed that, for instance, you can use market acceptability as a requirement in commercial product procurement. Once you agreed with that, once you agree you do not have to amend CICA to do that, for heaven sake, why not issue your statement and make it clear?

Senator COHEN. First, does your's agree with that?

Dr. BURMAN. Allan? Let me ask my attorney here.

Mr. BROWN. We could issue that statement. The last time the Government issued that statement, in the early 1980's, loud and clear, we got a congressional response telling us it was wrong. We got an appropriations rider for 3 years in a row stopping that program and that was the ADCOP program. There is still debate about it and we had a false start then—I mean this program, a lot of the reason why it does not get off the ground is every time we start out, there is not a consensus on the issues. There are others that I think are more difficult legally than this one, the commercial market acceptance. The program gets stopped in its tracks by the opponents. We are looking for consensus here.

Senator LEVIN. I understand, but I do not think you are going to find that, just because you had problems before on some issues, that you are going to have problems now on this issue. We cannot assume that, just because there were problems in the past on an issue, that means there still is going to be a problem or that it is even the same issue, because——

Mr. BROWN. It is the exact same issue.

Senator LEVIN. Well, there is a different climate now on this issue than there was in the early 1980's, I think. I would suggest this: You have been given legal advice that you have authority to issue this clarification. I believe you have that legal advice. I would suggest that you do it, notify the Congress, if you want to just cover your tracks a little bit, just say, "Look, we have been given advice

that we can do a number of things consistent with current law, we intend to do that, have is the clarification we intend to issue, we are going to issue it in 60 days." Notify the committees, do it, it is a lot faster, you have got the authority to do it.

Dr. BURMAN. Let me also suggest, though, that in the sections in the proposals that we put in the Defense Management Review package—in working with the Pentagon on the commercial products provision—there are some things that I think it is worth our sitting down with the Committee to discuss. You have got S. 1957 and they are very complimentary in a number of respects. It seems to me that we ought to be able to put some things together here to come out with something that would meet many of these problems.

I am reluctant to say that I would not want to continue to see something done with regard to that legislative package as well.

Senator COHEN. The likelihood of that package passing this year is practically zero.

Senator LEVIN. You are talking about exemptions from the procurement laws which took us decades to get into effect. You are talking about broad exemptions. You do not even enumerate the statutes which you want exemptions from in any specificity. Take our advice, it is faster, since you got the legal go-ahead to do it, tell us you are going to do it, tell the other committees you are going to do it and take that authority. You want to do it, you say we are in agreement on it, but you think clarification is needed. Do it.

Senator COHEN. It is not a Nike ad, either.

Dr. BURMAN. Just do it, is this a Nike——

Senator COHEN. Yes. By the way, what you just said I happen to agree with, there are some things that are going to take some clarification on. We are not talking about those, where we have to work together. But a lot of the things that you are proposing to be done should be done, should have been done long ago within existing law. Instead, you come here saying that you would like exemptions, you would like to be able to issue exemptions form all of these procurement statutes which we have put in place in response, in many cases, to scandals, wasteful procurements in many, many instances, including competition in contracting, which is on your list.

So, my advice to you would be that there are some things that you and the committees ought to discuss which may require some changes in law. But where you can proceed and have legal guidance that you can proceed to use commercial products more fully, just by the issuance of the clarification from your office, that you ought to issue it.

Dr. BURMAN. Well, we will certainly look into putting those clarifications together and seeing what we can do about coming up with something along those lines. I would like to get the support of the committee with regard to those clarifications.

Senator LEVIN. If you would like our reactions, just submit it to our staff and you will get some reaction.

Dr. BURMAN. Allan?

Senator LEVIN. Let me turn quickly to Senator Cohen. We have some other panels.

Senator COHEN. The other point I wanted to make is you are submitting a legislative proposal which is going to be fairly controversial. You saw the reaction of the Armed Services Committee to the

proposal early this week. You can bet there will be a similar reaction in a number of different committees in the House and Senate.

Given the legislative timeframe that we are going to be operating under this year, it is very unlikely that you will see adoption of that package, maybe some elements of it, but the entire package is unlikely. That is why Senator Levin and I are suggesting that you have got an opportunity now to do some things that we have recommended for the past year or more and we ought to do them.

Dr. BURMAN. OK.

Senator LEVIN. Thank you.

Dr. BURMAN. Thank you very much.

Senator LEVIN. We appreciate your coming.

Richard G. Austin, Acting Administrator, General Services Administration, accompanied by Richard H. Hopf III, Associate Administrator of the Office of Acquisition Policy, GSA, is our next panel.

Mr. Austin and Mr. Hopf.

Mr. Austin, you may proceed.

TESTIMONY OF RICHARD G. AUSTIN, ACTING ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION,[1] ACCOMPANIED BY RICHARD H. HOPF III, ASSOCIATE ADMINISTRATOR, OFFICE OF ACQUISITION POLICY

Mr. AUSTIN. Mr. Chairman and members of the subcommittee, I am pleased to present the views of the General Services Administration on S. 1957, a bill which facilitates the acquisition of nondevelopmental items and commercial products by Federal agencies.

As you have said, Mr. Chairman, with me today is Mr. Richard Hopf, GSA's Associate Administrator for Acquisition Policy.

Mr. Chairman, I have prepared testimony which describes GSA's efforts to promote the procurement of commercial products and provides our position in detail on the proposed legislation. With your permission, I would like to submit that for the record.

Senator LEVIN. It will be made part of the record.

Mr. AUSTIN. I do have a brief comment, Mr. Chairman.

The General Services Administration supports the intent of S. 1957, to promote and to facilitate the efficient and economic purchase of commercial products. This intent is consistent with existing congressional and executive branch policy and GSA's program objectives.

As a major procurer of common use supplies and services for the Federal Government, GSA has over the last 10 years engaged in a concentrated effort to structure its programs to maximize use of commercially available products in support of our customers. Nonetheless, we recognize that additional steps can be taken to facilitate the acquisition of commercial products. The Office of Federal Procurement Policy has a number of ideas in this regard and we look forward to working in support of OFPP's efforts, as well as that of this Committee.

We would also appreciate any legislative or regulatory initiative which simplifies the process of commercial procurement. S. 1957

[1] See p. 72 for Mr. Austin's prepared statement.

appears to be directed toward such improvements. At the same time, however, Mr. Chairman, we want to make sure that any improvements do not unintentionally disrupt activities which are currently successful. With this in mind, GSA has offered a number of suggestions for S. 1957 which are included in my written prepared testimony.

I, as well as Mr. Hopf, Mr. Chairman, at this time would be happy to respond to any questions that the Subcommittee might have.

Thank you.

Senator LEVIN. Thank you, Mr. Austin.

Last year, the Subcommittee held hearings on the Department of Defense's efforts to purchase commercial items. We heard testimony about the proliferation of contract clauses, in one case a contractor was asked to sign an inch-thick contract for the sale of less than $500 worth of equipment. We found that different agencies and even different parts of the same agency used different clauses, leading to a confusing inconsistency in contract requirements.

In your experience, Mr. Austin, do civilian agencies have the same kind of problem with inconsistent use of multiple contract clauses?

Mr. AUSTIN. Mr. Chairman, to my best knowledge, that could exist as each individual contract officer develops the requests for offers and specifications. We would not be objectionable to OFPP being the central entity identified to provide for a standardized clause, but would also hope that we might also be able to provide on product-specific items additional clauses that would either provide clarity or define quality, if you will, of the product that is needed.

I guess what I am saying, Mr. Chairman, is that we have had a problem in terms of proliferation of clauses, but in some instances on product-specific items, we need greater clarification. I would suggest that the example that you offered actually goes to the far end of the spectrum of what might well be needed.

Senator LEVIN. When the GSA places a product on the multiple awards schedule, it does as detailed examination of prices that the seller charges its commercial customers. Do you believe that this type of examination of price data is adequate to insure that the government is getting a fair price?

Mr. AUSTIN. Yes, sir, I do. Mr. Chairman, we are not only using that document for establishing what the floor might be, but, as well, what is the maximum, and, therefore, providing the range in which that negotiated process takes place.

Senator LEVIN. Now, if you have a product that is sold commercially and examine that type of data, do you think that you need to have cost data, as well, to ensure that the government gets a fair price?

Mr. AUSTIN. Mr. Chairman, if it is currently market available and there is adequate documentation of pricing within that market, I would have no objections to describing the market available pricing.

Senator LEVIN. Now, the FAR, the Federal Acquisition Regulations, sets out specific numerical tests to qualify for a commercial exemption to the requirement for cost data. For example, the FAR

requires that a minimum of 55 percent of the sales to the general public be made at catalog price, that is, published price regularly maintained by the seller. If we have all of the seller's price data, why does it matter whether—why does it matter at all whether the information is published in a catalog?

Mr. AUSTIN. Mr. Chairman, as I understand it—and I would ask Mr. Hopf perhaps to respond on this—as I understand it, that is the published price which is known to the public and it lets us establish an acceptable base for which to begin.

Mr. Hopf, let me ask you to answer that as well, if you would, please.

Mr. HOPF. That is correct, Mr. Chairman. When companies have catalog prices, it demonstrates that they have a viable product in the marketplace and that that catalog price represents a base from which they sell. They may not sell every time at that catalog price and, indeed, companies have practices of selling at discounts from catalog price, but that information and the interplay of various buyers and sellers within the marketplace all form together to tell you whether or not you have a commercially viable product on which you can have some reliance that the prices that exist out in that marketplace give you at least some reasonable assurance that those prices are within a norm, that they are reasonable prices, it also helps you conclude that you have got a mercantilable product, that is, a product that is actually going to do what it is intended to do.

Senator LEVIN. If you know all of the prices on all of the sales, what does it matter whether they are published?

Mr. HOPF. I suppose if you knew all the prices on all of the sales, the existence of a published document certainly may be considered less important, but I think it still goes to the fact that this person or this company is running an ongoing business and this is an item that they represent to the public, that they have a market price on which they base their price and/or they have a catalog price on which they demonstrate to the public that this is a regularly sold item.

I do not know if the existence of a catalog price in and of itself then becomes extremely important, but it certainly helps to convince the government that, in fact, we do have a commercial item.

Senator LEVIN. Does not the Truth in Negotiations Act say that sales information should be provided at catalog or market price?

Mr. HOPF. That is correct, sir.

Senator LEVIN. Well, if you have the market price, why do you need the catalog?

Mr. HOPF. If there is a way of establishing the existence of that market price, I guess the point is that most corporations, most companies establish that market price through the existence of a catalog, but it can be established through other mechanisms.

Senator LEVIN. However it is established, if you know what the market price is, if you have that information——

Mr. HOPF. Yes, sir, then we can establish that market price, that is correct.

Senator LEVIN. You do not need the catalog price?

Mr. HOPF. Not necessarily, no, sir.

Senator LEVIN. Not necessarily, why do you need it at all? Once you said it may not be extremely relevant, suggesting it is relevant. Now you say you do not necessarily need it and I am trying to get at your qualifier. Why do you need it at all, if you have got the market price?

Mr. HOPF. If, indeed, you are able to establish the market price by alternative mechanisms then the actual existence of a catalog price may not be all that significant, that is correct.

Senator LEVIN. It may not be all that significant——

Senator COHEN. You said it again. Why do you not say it is not significant, you do not need it?

Mr. HOPF. Fine.

Senator LEVIN. I am curious about the qualifier. That is what creates the ambiguity, it seems to me, it is that very kind of qualifier. Tell us, because——

Mr. HOPF. I guess what I am worrying about is the mechanisms for establishing price, yes. Indeed, if you are able to demonstrate the interaction of buyers and sellers at various prices for that item, then, yes, indeed, that would suffice.

Senator LEVIN. That would do it?

Mr. HOPF. Yes, sir.

Senator LEVIN. OK.

Senator Cohen?

Senator COHEN. To bring it down to a parochial level, my father is a baker and well known in the community and, let us say, he wants to sell to the Air National Guard, he wants to have a contract with them. He does not have a catalog price. It is pretty well known what the market is for bread in the community, so would he be precluded, because he does not have a catalog price but has a pretty well-established market price?

Mr. HOPF. He would not be precluded from selling to the Government.

Senator COHEN. As a matter of fact, there would be no necessity to have a catalog price in that particular case?

Mr. HOPF. No.

Senator COHEN. That is all that Senator Levin and I were trying to say, there are examples where you simply do not need to have a catalog price in order to qualify, if there is an established basis for a market price.

Mr. HOPF. That is correct. It simply becomes a method of demonstrating the existence of a product which is being sold in the commercial marketplace.

Senator COHEN. In Mr. Burman's written testimony, he indicated there had been major vendors who have complained to OFPP about the procedures used by GSA in negotiating contract prices. They maintain they are very burdensome, very costly to prepare and are inconsistent with the Paperwork Reduction Act. I was just wondering what your response is to that.

Mr. AUSTIN. Senator, since having come to GSA, that has been one of the common discussions that have taken place between myself and the private sector, whether it be with the associations or with individual entities.

To that end, what we have done is create what I have called a roundtable, it is an industry advisory group that sits and discusses

problems of interest both to the private sector and the public sector. Out of that group has come a focus group which is particularly looking at the process of the multiple-award schedule.

I can explain to you even a greater problem. If you look at GSA in a picture-wise way, on Federal supply side we have a multiple-award schedule process which is uniquely different than on the information resource management side—the same government, the same agency, different processes.

What I have tried to do, then, is form a group that can sit down, both in terms of the agencies, our agency and the private sector, and begin identifying and addressing that whole spectrum of problems that are created there.

One of the outgrowth, if you will, is a discussion relative to creating a program manager which will oversee both sides of the house and act as a liaison to the private sector. But the short answer to the question, Senator, is that we are trying to address that specific issue of what do we need to establish competitive prices, how do we do that, what documentation and what data do we need.

Senator COHEN. Did you have an opportunity to review the legislative proposal and offer any comment on it before it was submitted?

Mr. AUSTIN. On which proposal, Senator?

Senator COHEN. The package that was presented by the administration, the Defense Management——

Mr. AUSTIN. Defense Management, yes, sir, we did. On several occasions, we have had ongoing discussions, both in terms of a comment phase over the last several years, most specifically last March, when we saw certain sections which were going to be inclusive in there that dealt with interests with GSA.

We made certain comments back on that, there was follow-on discussion. We then sat down and talked both with the Office of Federal Procurement Policy and with DOD and resolved the remaining concerns that GSA had in most of the areas within there. Yes, sir, we did have comment.

Senator COHEN. Did you agree that there was a need for more dramatic changes in the procurement process that were contained in S. 1957?

Mr. AUSTIN. In terms of the Defense Procurement Management Act?

Senator COHEN. Yes.

Mr. AUSTIN. To the degree that it impacted on GSA or GSA had an involvement there, in terms of oversight or procurement activity itself, yes, sir.

Senator COHEN. Do you think there are more dramatic changes that need to be made than have been proposed by Senator Levin and myself?

Mr. AUSTIN. We think yours is a start, Senator. We do not know that it is the end.

Senator COHEN. Well, we sort of started and then it all stopped. It stopped last year. We made a number of recommendations and virtually nothing has been done in a year in terms of implementing the recommendations as to how we could improve off-the-shelf purchasing. We are back here a year later and a proposal comes in and says, look, this is a very complicated process here, what we

think is we need to remove the application of a number of these things, but none of the 16 recommendations that I am aware of that were proposed last year coming out of this committee have ever been implemented, as far as I am aware.

Mr. HOPF. Are you referring to the DOD authorization?

Senator COHEN. Yes.

Mr. HOPF. Well, as indicated in Mr. Austin's testimony, we have not perceived the Competition in Contracting Act to be a barrier to the procurement of commercial products. I think I agree with Dr. Burman that there is probably some psychological barrier there and there is probably a great deal of fear on the part of Government procurement folks to go too far, but I do not see it as a barrier and our agency does not.

Senator COHEN. That is the job of OFPP. If there are psychological barriers, you ought to remove those. You ought to say, "Okay, we are going to massage your psychological concerns here and tell you by sending out a letter that this is what the Office of Federal Procurement Policy believes to be the case and the procedure we are going to follow."

Mr. HOPF. Yes, sir.

Senator COHEN. If there are psychological handicaps, but we cannot legislate that, other than by simply removing the law requirements, removing all of these provisions, because we cannot deal with the psychological aspects of it.

Mr. HOPF. As I said, Senator, in the General Services Administration, we have not looked at it as a barrier. In fact, I think a lot of our activities indicate that we do not perceive it as a barrier. We have been making extensive efforts to move away from design specifications. Quite frankly if we can get a commercial product, we do not want design specifications. We have converted 1,600 design specifications into commercial item descriptions which are heavily weighted towards performance and functional concepts. That is the type of thing we are looking at.

We do not really look toward creating new and different types of inspection procedures for commercial products. We have programs that try to reflect commercial industry practice with respect to inspection. With warranties, for example, for the most part, we look to commercial warranties. We do not try to design special Federal warranties for commercial products.

So, I think GSA would certainly agree with you that we should not look to that particular law in any respect as a major barrier. To the extent that psychological barriers exist, then I think anything would help, whether that is taking a firm stand from our position as policy folks or whether it is from a legislative stand from your bill, and we see also a measure of help coming from Dr. Burman's bill, as well.

Senator Levin. Going back to that question of the catalog prices for one minute, I am kind of intrigued by that. If you can establish the market price from all the sales data, what is the need for requiring, as the FAR does, that 55 percent of the sales be at the catalog price in order to get an exemption to the requirement that all the cost data be provided?

A minute ago, we finally got you to agree that, no, it doesn't make sense that you insist on a catalog price if you can establish

the market in another way. I think you agreed to that, finally. But we have the FAR that says that in order to get that exemption to the requirement—which is an onerous requirement in this commercial area; for a company to have to submit all of its cost data when it is a commercial company is very onerous and deters companies from participation. So my question is what sense does it make for the FAR to require that 55 percent of sales be at the catalog price if you could establish the fair market price in other ways that you don't need a catalog price at all?

Mr. HOPF. Well, first of all, I don't think there is any requirement for the submission of cost data to get to that point. The reference to the catalog price is——

Senator LEVIN. To get to what point?

Mr. HOPF. Sales from the catalog price does not require the submission of cost data associated with that, simply to try to get the corporation to give us some indication as to what is the measure of the interaction out there in the marketplace.

I think you make a good point with respect to what is the focus on the catalog, and I think probably what I would like to do is to go back and check that out for you, perhaps, and give you a better answer than I am giving you. It is obviously not satisfactory.

Senator LEVIN. Well, let me give you an example. We had a case last year in which a Michigan company was asked to produce cost or pricing data on most of its products to qualify for the multiple award schedule because its percentage of private sales for these products was too low—not because there weren't significant commercial sales, but because the percentage requirement was too low. As a result, the company had to provide cost data and justify all of its costs, which its competitors did not have to do, and did not want to do it.

Now, mind you, it had significant sales, so it was not a question of where there weren't significant sales. It was just a question of where its sales were not at that artificial percentage that was required.

Would you agree that that is unfair—if you have significant sales that you shouldn't have to meet a certain percentage of your sale requirement?

Mr. HOPF. I suppose it depends on what significant sales are. Unfortunately, when you get into terms like "substantial" or "significant", at some point you've got to get some degree of artificiality. The regulations that we have do identify what we consider to be substantial.

Now, I agree with you that it is artificial to an extent. I think the regulations also reflect the fact that it is artificial because it also gives the contracting officer leeway in dealing with the particular level of sales that exist out there, in other words, that it may not meet certain specific criteria like 50 percent, but they give contracting officer a leeway to nonetheless consider the interaction in the marketplace to be adequate for the pricing purposes, and indeed, that is reflected.

I would say that we are currently looking at that whole issue right now, at a regulatory level, and looking at the percentages that we have there to see if they accurately reflect our concerns with what degree of interaction in the marketplace is going to be

sufficient. And I would suspect that you will be seeing something in the near future that deals specifically with that issue.

Senator LEVIN. Would you agree that if you can define "significant" or "substantial" that the percentage requirement then becomes artificial and could result in an onerous requirement being imposed on a company which should not be? Would you agree to that—assuming you concluded that there were a significant number of sales out there in the commercial world, that you should not have to have your 55 or whatever the artificial percentage would be?

Mr. HOPF. And what would the standard be, then, sir, for significant?

Senator LEVIN. If you were satisfied that a significant percentage of sales existed—putting aside how you define it—would you then agree that we should not have an artificial percentage requirement?

Mr. HOPF. I'm sorry, sir, I can't focus on that one.

Senator LEVIN. OK. You said in your last statement that you are reviewing this question of whether or not we should have a percentage requirement where there are substantial sales.

Mr. HOPF. That's correct, sir.

Senator LEVIN. You suggested that you might change the percentage requirement in the case of substantial sales rather than eliminate the percentage requirement.

Mr. HOPF. That's correct.

Senator LEVIN. My question is if you are satisfied that you have those substantial sales, why not eliminate the percentage requirement.

Mr. AUSTIN. I think——

Mr. HOPF. Again, I'd be glad to go back and take a look at that for you, sir, and give you a better answer than I'm giving. If we can come up with other methods for determining whether or not there are substantial sales in the commercial marketplace, then certainly we would be considering it. The approach that is taken in the regulations right now is one way of doing it; if there are other ways of doing it, we would certainly be willing to consider them.

Senator LEVIN. All right.

Senator Cohen?

Senator COHEN. Just one other point. I want to get back to that parochial issue I gave you before about my father's bakery.

In that particular case, he would not be precluded from bidding to the Federal Government, or submitting a bid without a catalog price—that's agreed, right?

Mr. HOPF. Yes.

Senator COHEN. But would he be required to provide the cost and pricing data to the Federal Government?

Mr. HOPF. I don't know. I will have to check that for you, Senator Cohen, and get you a precise answer.

Senator COHEN. Yes, because I am told that he would. To give you an example of the situation, it is a three-man operation, totally family. You can go into any one of the local stores around here and buy those hard rolls, and they sell for either 30 or 35 cents apiece in a store here, and roughly the same—not quite as much—back in Maine. My father sells a dozen for $1.50—a hell of a deal—excuse

me—a great deal. But would he have to then demonstrate to you as to how he arrived at $1.50 for a dozen—how much flour, how much rye, how much sugar, whatever, goes into the production of that product—because if he does, he is never going to bid on a contract with the Government, even though it is well-known in the community that it is the lowest price and the best product. He can't bid under the regulations as they exist.

Mr. HOPF. I will be pleased to check that out for you, sir, and give you an answer.

Senator COHEN. It is a hypothetical case because there is no government that he wants to sell to, but I would just raise it, obviously.

Mr. AUSTIN. I might add on that response, Senator, that that is one of the more contentious items that we are hearing about from the public sector, and it is one which in reviewing, I am hopeful we will be able to come forward with some recommendations on in some fashion, whether that is to set it aside as a consideration, establish the commercial marketability of a product and use that as the base—we are hopeful we are going to come forward with something in that area.

Senator LEVIN. When?

Mr. AUSTIN. Quite frankly, Senator, I know the focus group is still meeting on this issue, and I am not sure that a timeframe for the end results of looking at the total multiple award schedule has been established.

Richard, have you a feel on that?

Mr. HOPF. No, Mr. Austin. I might add, Mr. Chairman and Senator Cohen, that in General Services Administration we have no great desire to obtain cost data on items which could be considered commercial products. Quite frankly, if there is a bent on the part of our contracting office, it is generally to try to figure out a way of determining the product is commercial, and we do look at the flexible standards even though there is some artificiality as to the percentages that exist within the regulations.

Cost data is not particularly helpful to us in commercial products. Quite frankly, we are not all that interested in it.

Senator LEVIN. Well, that's exactly the point. You are not interested in it by definition because it is a commercial product. On the other hand, the company that has to provide it has a tremendous burden in being asked to provide it.

I mean, theoretically, as I understand the current situation—and I may be wrong—you could have a company that sells $1 billion in products a year; if $600 million of that is sold noncommercially and $400 million is sold commercially, they've got to give you cost and pricing data, although you've got $400 million of prices in the commercial market; is that correct?

Mr. HOPF. Yes, sir. But I think the point that I'm trying to make to you is that although there is a thought process that occurs under the regulations in conformance with truth-in-negotiations to determine whether or not you need cost data, my point is that for the types of things that GSA is buying, which are predominantly commercial products, we are not going out of our way to artificially apply those rules to the best of my knowledge in an attempt to get

cost data. We really don't want it. And as a practical matter, GSA doesn't have much experience in dealing with cost data.

In the Department of Defense, where they are out there buying different types of items, there in fact is a great deal of experience in the use of cost data, and I think that is probably the big difference.

I hesitate to give you a very specific answer on some of those questions simply because in the cost data area, I just don't have that much personal experience, and quite frankly, not many people in GSA do. We are more interested in pricing information and price data, and that is where we are coming from. We don't want cost data. That's not our bent.

Senator LEVIN. That's good, and I think we ought to try to make sure that our rules don't require it unless it is absolutely necessary.

Mr. HOPF. Yes, sir, and I will follow up on your question.

Senator LEVIN. If you can give us a timetable for your review, it would be appreciated. Just let us know for the record when you expect that review will be completed.

Mr. AUSTIN. We'd be happy to, Senator.

Senator LEVIN. Thank you, Mr. Austin and Mr. Hopf. Thanks so much for coming. Is that all, Senator Cohen?

Senator COHEN. Yes.

Senator LEVIN. Thanks so much.

Mr. AUSTIN. Thank you very much.

Senator LEVIN. Our last panel represents the Computer and Business Equipment Manufacturers' Association, CBEMA: David Burke, who is Federal Policy Manager at Digital Equipment Corporation; Thomas A. Ryan, Manager, Government Sector Marketing and Policy for Xerox Corporation, and Ron W. Gallier, Vice President, Governmental Relations, of Multigraphics, a Division of AM International, Inc.

Mr. Burke, why don't we start with you?

TESTIMONY OF DAVID BURKE, FEDERAL POLICY MANAGER, DIGITAL EQUIPMENT CORP.; THOMAS A. RYAN, MANAGER, GOVERNMENT SECTOR MARKETING AND POLICY, XEROX CORP.; AND RON W. GALLIER, VICE PRESIDENT, GOVERNMENTAL RELATIONS, MULTIGRAPHICS, A DIVISION OF AM INTERNATIONAL, INC. ALL REPRESENTING THE COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION [1] DIVISION OF AM INTERNATIONAL, INC.

Mr. BURKE. Thank you very much, Senator Levin and Senator Cohen. It is nice of you to have us up today; it is nice to be on the side of the cheering section as opposed to having to answer sharp questions.

We are indeed very interested in your past work both in the 1986 and 1989 defense authorization bills. We are hoping to see the agencies put more effort into procurement reform as that process continued. We are very, very interested in exploring such concepts as market availability developing it to a point where it can be insti-

[1] See p. 84 for prepared statement of the Computer and Business Equipment Manufacturers Association.

tutionalized and replace, in Senator Cohen's words, some of the psychology against commercial buying that now exists in the agencies and has to be sort of forced out in giant steps. We think that is a top priority.

CBEMA subscribes to the principle that current legislation should be kept to the minimum required to define or implement a change in public policy. That seems to us to be the direction that S. 1957 is taking.

Our pain and frustration is that current regulations or applications simply do not fit the commercial model. We still are encountering unique contract clauses, burdensome data requirements, and unnecessary certification and protracted time spans between the issuance of an RFP and contract award. We will have some examples in just a moment.

The commercial marketplace, even with its imperfections, we believe, offers the best business model—far better than the one we are now having to work under. Many Government authorities, as you have seen in your testimony and in the proposed legislation, argue that the Government cannot touch this commercial model given the constraints in law and regulation. We believe that there is so much that can be done at the lower level that isn't being done, and it makes us enthusiastic to be able to think that we now are able to do that.

We would argue that you can, provided you are willing to proceed in an evolutionary manner, go for business behavior changes and new thinking. Most commercial vendors are not asking for sweeping changes in the face of congressional skepticism.

Throughout most of last year, CBEMA did its own analysis on what was needed by way of the commercial contracting reforms in the FAR system. For the hearing today we used our findings as criteria to measure S. 1957. S. 1957, I am happy to report, measures up quite well against what we thought the world should look like, especially when certain improvements are added, such as recognizing the commercial product as the equal and not necessarily a subset of the NDI expression; addressing the need for databases in support of marketing research, a very key thing to changing the psychology of how a contracting officer buys; and giving equal status to the commercial acquisition process with respect to cost or pricing data by not making the commercial acquisition process an exception to the need for cost or pricing data.

We think S. 1957 gives us a good shot at reforming the FAR system by incorporating these so-called easier-to-do processes first, such as commercial contract forms, shipping, invoicing, warranties, broadening the definition of a commercial product, commercial acceptability, and eliminating most cost or pricing data requirements for commercial vendors.

When we have shown you what we can do, what we can say, and how we can help the Government operate more efficiently, we think maybe then it is time to come back and, if we have run up against a wall, ask for legislative changes. This is not the time to do that now.

I would like to enter into a few examples. Tom Ryan, on my right, has an example which is illustrative of some of the situations we are running up against.

Tom?

Mr. RYAN. Thank you, Mr. Chairman, Senator Cohen.

I have brought a couple of props today to illustrate what I think is a case of overspecification.

I have here a typical bottle of toner for a copying machine. This bottle of toner generally comes, in a four-carton box of this nature. Large customers would buy perhaps 100 cartons of this on a skid for their own environment.

There is a current procurement under way where the requirement is to special-mark each bottle with the contract number. Now, in an automated manufacturing process where you are trying to reduce cost, certainly this is out as an over-spec, we believe.

The requirement would cause us to special-handle each bottle at an increased cost of about 15 to 20 percent. This particular procurement represents less than 4/10 of 1 percent of our total production.

Furthermore, there is no practical utility for the marking because this supply item is going to go into a captured customer environment where nobody else can even have access to this particular supply and because of the nature of the procurement.

We believe that if standard marking is good enough for 99.6 percent of our customers, it should be good enough also for the other 4/10 of 1 percent for the Federal Government.

Senator LEVIN. Thank you.

Mr. BURKE. Thank you, Tom.

We are good on props today, Senator.

Senator LEVIN. You guys aren't running for office or anything like that, are you?

Mr. BURKE. You spoke earlier of the multiple award system. I'd like to give you a visual illustration of what a multiple award submission looks like, with the help of Jim Meer, my associate. We are going to compare the usual size of a GSA response to the multiple award schedule solicitation with what we think is representative of the different kinds of alternate responses that should be considered.

I have on my desk a copy of an alternate commercial offer based on the vendor's commercial terms and conditions and modified to accommodate Government statutory clauses. It offers savings in the neighborhood of $18 million, and if it is extended over several contractors, this could grow into a very, very appreciable figure. The proposed savings are not a bluff. As Everett Dirksen, the namesake of this building, said, it's real money. And if the Government were to have signed this contract on the spot, the contractor could have delivered at these prices.

The really neat thing is that we think the contract contains all the required clauses by law, and therefore there are no statutory changes needed.

Back to your earlier point. This is an example of things within the system that can be changed on an exploratory basis. If they are sensitive, if they are against the grain, we can check with the committee, we can discuss before we do it. And by the way, we do use Mr. Austin's focus forum; we think it is a very good dialogue. It is just up and running, and it is these kinds of forums we use.

I'd like to turn to one more example—a bit dramatic.

Senator LEVIN. Excuse me. I did not follow that example. Go through that again. Compare these boxes with that envelope.

Mr. BURKE. Yes, sir. This envelope, this contract, is based on the contractor's commercial terms and conditions modified to include the clauses that are required by statute and the FAR system. We took this contract to GSA over a period of 3 years at different times. We farmed it out for independent review to see that it was adequate. It now shows up in several forms. You may have heard of the Compact Group, which has published what they call a commercial contract form, which is a kind of a variation or a second generation of this contract.

Our alternate proposal implies that the Government could do business in the multiple award schedule system on a commercial basis. It implies also that this takes a great, aggressive leap forward, but does not necessarily need legislative changes to do so.

The issue in all this was the Government's concern that if a contractor, at least one contractor, was willing to offer lower prices to do this, what would the risk be; why should we not do this? We have been unable to enter into any kind of a meaningful dialogue with GSA that defines these risks.

Senator LEVIN. Now, what is in the boxes?

Mr. BURKE. In the boxes are the supporting paperwork for the normal submission that follows the GSA solicitation form. Basically, they are pricing documents, line-item pricing, descriptions of items. They follow along through sections L, M, the mandatory sections of the GSA solicitation.

Senator LEVIN. Is there any cost data in there?

Mr. BURKE. There is pricing data. There is no cost data as we define it. There is what the GSA calls in this instance marketing and sales data.

Senator LEVIN. And you are saying that is unnecessary.

Mr. BURKE. It is unnecessary in the sense that the Government one, could get lower prices by dealing on a commercial basis and two, this is arguable, and it needs to be discussed—but we think without an increased risk to the Government. We think that the reason for asking for more data is really to reduce the risk factor. I don't intend to try to answer Rich Hopf's question, but on our side of the House we look at requirements for huge amounts of data as kind of a reassurance that everything is all right, and the higher you can raise that satisfaction level, the less likely would be someone to question your decision at some point.

Senator LEVIN. All right. What I would suggest we do at this point is——

Senator COHEN. Get a picture.

Senator LEVIN [continuing]. Yes, I don't think our bill addresses this particular issue that you are referring to, and I think we ought to ask the GSA, however, to meet with you and to get back with us and to comment on what you are saying, because you are making a very potent point, obviously.

Mr. BURKE. Fine.

Senator LEVIN. So we will ask the GSA to enter into that dialogue with you——

Mr. BURKE. We'd be happy to do that.

Senator LEVIN [continuing]. To give us a report back, and both of you perhaps after the meeting, can let us know the outcome of that meeting. I don't believe the particular issue that you are raising, however, is addressed in S. 1957.

Mr. BURKE. Well, we think the broad parameters are. We do appreciate that invitation, and we will do that, certainly. But we think that the parameters are there, which is the beauty of the bill; it allows a little creativity and testing of what might be feasible.

Senator LEVIN. Right. And we may want to make it more than just broad parameters. We may want to be more precise in this area if we can do that. But that would require some dialogue. So if you could get back with us, and we'll ask GSA to do that.

Mr. BURKE. We'd be happy to do that, Senator.

Senator LEVIN. Thank you.

Mr. BURKE. I'd like to turn the floor over to one more example which is worth your attention.

Ron?

Senator COHEN. Before you begin, are there actually papers in those boxes?

Mr. BURKE. Yes, sir. That is actually our file copy of the solicitation which we are required to keep on file.

Senator COHEN. The first thing we ought to do is ask GSA to actually read it. [Laughter.]

Senator LEVIN. And you said it would save $18 million if we proceeded the way it is on your desk instead of the way that is on this cart here?

Mr. BURKE. Right. Those were the numbers based on the percentages off-price in this alternate offer; the difference if one stays at a certain level, a forecast level of sales. It is a number that could be arguable, but it is very large.

Senator LEVIN. I think the argument the GSA will make is that without the price data, we would not be able to know that our interest is being protected. Is there some way inside that envelope in front of you that you think should reasonably satisfy the Government in that regard?

Mr. BURKE. Right, we do believe that. We also believe GSA's position is that the Government is not adequately protected and it is on that point that the discussion is not yet joined fully to be able to say what are these risks and how do we define them and how can we maybe make a contractual arrangement which satisfies both sides.

Senator LEVIN. And is the $18 million a figure which is an unusual figure? Is this a particular complicated or large job?

Mr. BURKE. No, sir. It is a back-of-the-envelope figure, really. It is just based on prior sales and the differential between what one could expect to achieve in a normal negotiation versus what one would expect to achieve in prices on this basis.

Senator LEVIN. And is that because it costs $18 million—I am a little confused—to produce those boxes? Is that it?

Mr. BURKE. Not really—the differential, sir, cannot be completely broken down to discrete and describable things, but there are a couple of major clauses which can be singled out. There is what is known as the price reduction clause. The price reduction clause in

the GSA contract does require, as its name implies, an awful lot of policing and verification. And most of our businesses, as we decentralize and move out into districts and try to become more aggressive to keep up with competition, becomes extremely difficult to sort of police this sort of thing. But you do have to do it, and there is a great liability for not doing that.

Senator LEVIN. Since we are interrupting you for questions, you might as well just continue on this one line. How do you know you are getting a fair price without that particular price data?

Mr. BURKE. In most cases, your commercial credentials would include a published price list, a discount list, which is usually based on the volume of business done. GSA would define itself in the same way as a large Fortune 500 company defines itself on the basis of its business. The cost of doing business and the negotiations would be joined on that basis—where do I come out on your charts, and where should I be.

That is basically the framework that is used now. It is just the data that is used to get both sides to the table is different.

Senator LEVIN. Okay. Do you want to complete your testimony?

Mr. BURKE. Yes, sir. I'll turn it over to Ron for a slightly different perspective.

Mr. GALLIER. Thank you, Mr. Chairman, Senator Cohen.

I'd like to describe an actual procurement that I believe demonstrates the absurdity of imposing regulatory impediments on the acquisition of commercial products and to the detriment of both parties.

Every year GSA procures a simple 4-by-4 cotton pad used in the lithographic printing industry by every commercial and Government printer in the world.

To my knowledge, this pad is made by only one manufacturer, Kendall Company, and it is distributed through various distributors and dealers throughout the country—throughout the entire world, as a matter of fact.

The competition, of course, exists through these distributors. It is available in virtually every graphic supply house in the world.

GSA buys this product on an indefinite quantity contract, awarded annually, for about 4,500 cartons or about $180,000. For this purpose, GSA has developed a commercial item description, AA1083.

On July 28, 1986, a solicitation was issued for this annual requirement. Bids from four bidders were opened on August 27, 1986. AM International was low bidder. Because the FAR 46302 requires the inspection of supplies when the expected amount exceeds small procurement procedures, on September 22, a pre-award survey was ordered to see if this company was capable of performing these tests.

On September 22, Region I was instructed to do a site survey of the Kendall Company laboratory in Walpole, Massachusetts. On October 9, Region I reported that the Walpole location was incapable of performing the test because it was determined that the pads were manufactured in Bethune, South Carolina. So the jurisdiction was switched to Region IV in South Carolina, and they inspected the Bethune plant in South Carolina and determined that that plant was incapable of performing this end-item test, and they had

no responsibility, since AM International as responsible for such test if one would be required.

So the site survey was then switched to Chicago, and we had inspectors visit our plant and ask if we were capable of performing this test, and it was reported on November 21 that they determined that we were incapable of performing this test.

On March 9, 1987, a determination of nonresponsibility was made concerning AM International, and the award was made to a higher bidder based on their prior year's performance. The basis for the determination was FAR 109-104, which says:

> The company shall have the necessary production, construction and technical equipment and facilities, or the ability to obtain them.

A direct quote from the report from the contracting officer's report:

> Multigraphics Division of AM International does not have the technical capability or personnel to determine contract conformance to commercial item description AA1083. In addition, they do not have a quality control department or a written control manual that describes the inspection system in effect.

I would like to perform that test for you right now that this billion-dollar corporation—four trips, five reports and protest award that resulted from that—was not capable of performing.

"Note. No more than 30 seconds shall be required for the complete submersion of a pad when tested as follows: The pad shall be held parallel, but not in contact with, the surface of water at 25 degrees, then dropped lightly upon the water. The time required for the pad to submerge completely shall be recorded to the nearest second." You know we passed that test.

Mr. BURKE. That was 12 seconds. You passed.

Mr. GALLIER. Thank you very much.

For this procurement, we wrote a special item description; a solicitation was prepared; bids were mailed; bids were opened and evaluated; three award surveys conducted at Walpole, Massachusetts, Bethune, South Carolina, AM International; three reports were written, mailed, read, evaluated; eight months elapsed. Notice of award was made to all the other bidders, and they still ended up buying a higher priced item.

We think that demonstrates the absurdity—but I would hasten to point out that all of the people involved did exactly what they were supposed to do in accordance with the regulations.

Thank you.

Mr. BURKE. Thank you, Ron.

I'd like to summarize, Senators. We haven't said anything about section 202. I want to say just one thing. We worked very closely with the OFPP in a lot of different commercial issues over the last couple of years. We think that is an excellent forum over there; we think there are excellent people involved. And we would like at least you to know that there is a dialogue going on with industry—Mr. Austin mentioned the forum—and we think that sort of triangle dialogue is going to be a lot of help. So that section 202 can be picked apart and its parts may be drawn back into the fold in what we would call a consensus among industry.

Our focus today and as always has been on doable practices—simplified contract forms, functional specs, getting rid of absurdi-

ties and absolute dictum. Give us a chance to work on the changes we proposed last fall. We can institutionalize these simple changes if we change, as Senator Cohen calls the psychology or mind set of the system we now work in.

Take, for example, the example of market research discussed today. The principle should be the buyer, not the seller, should do market research. We want to build our own rules from ground zero and not be sort of force-fitted into a planes, tanks and guns procurement mentality.

We also want to fix the MAS policy so that it becomes a showcase supply system, operating on a commercial model and recognized as a fully competitive system. Fixing, in our definition, begins by addressing the MAS policy at the top levels within GSA, with the aim of changing the policy to emulate commercial practices, and by using program management disciplines to administer the GSA system. Mr. Austin has certainly recognized that today, and it is a part of his agenda as I understand it.

If we can get truly cooperative programs going between industry and Government, we could come back here next year with credible results and savings to show for it. Then we could discuss whether CICA or other laws need fundamental changes, but only then.

On behalf of my colleagues and the association, thank you for having us here today.

We'll take your questions.

Senator LEVIN. Thank you, Mr. Burke and your colleagues.

I have a few additional questions. I'm afraid to ask Mr. Gallier any questions at all; I'll get more discouraged, I am afraid, than I am already. That was a hell of a demonstration is all I can tell you, and very potent—and all your testimony was very potent. I was going to say I would drink to that. [Laughter.]

I guess the first question we have of you, Mr. Burke, is relative to CICA. The administration's commercial product proposal would exempt purchases of commercial products from the Competition in Contracting Act. Your proposal by contrast specifically states that CICA shall remain in effect and continue to govern commercial procurements. Do you think that an exemption for CICA would be an advance or a retreat in our efforts to get the Government to purchase more commercial products?

Mr. BURKE. I think an exemption would be a retreat, only in the sense that it would put us back to where everything becomes arguable again, and we would simply not be able to test or function.

We said earlier, and we do believe, that we can pick pieces of the commercial practices structure—market availability, in your terms—and use them, and if we do find ourselves running up against a brick wall, we always want the option to come back to you and say that, but we are not ready to do that now.

Senator LEVIN. You have testified very eloquently about overspecification. It is obviously not a DoD-unique problem. Do you have any suggestions for additional steps that we can take to address the overspec issue, other than the ones that we are considering right now?

Mr. RYAN. Well, I think if we deal in the environment we are in, which is really off-the-shelf products, what we really need to do is to look at what range of products can fill a solution for the custom-

er rather than trying to spec it. Sometimes they get so defined in functional specs or functionality that we forget the real objective is what solution are we after.

If the focus for the procurement were on solving the users' or the customers' needs rather than trying to get so fine in terms of specifications to create a competitive environment, we believe there would be a lot more competition and a lot more creative solutions to whatever the requirement for the customer was.

Today, in the environment we deal in, unfortunately, because of all the oversight that exists, the procurement officer is put in a very difficult position. They have to follow the rules. Sometimes they meet the customers' needs—often they meet the customers' needs—but sometimes they don't when you try to define things so specifically.

Senator LEVIN. Mr. Burke, we have heard from you, I believe, to some extent your colleagues, but even more so from a number of other witnesses, that they have trouble selling their products to the Department of Defense because of the confusing inconsistency with which various Defense agencies apply required contract clauses. I am wondering if you could compare Defense and non-Defense agencies as to whether or not you have a similar degree of problem with confusing and inconsistent requirements in contracts.

Mr. BURKE. Well, I don't think we have a consensus on that, Senator, but I think that in general, the civilian agencies tend to be the easier of the two entities to deal with. The exception to that would be when a civilian agency is dealing with a very major, as we know it, a major systems procurement, which is not their usual way of doing business. That can be a problem because the expertise with respect does lie on the DOD side.

The DOD side is by far the more difficult because of the service autonomy that exists. I'll use some examples. The treatment of rights in technical data in computer software still varies from service to service or Defense agency. The idea of warranties, the idea of testing, acceptance of any parts of what you call your commercial availability spectrum, varies from place to place.

So I think the lack of uniformity is what keeps the commercial world off-guard.

Senator COHEN. You will be happy to know that we have the same position entirely in dealing with agencies. Senator Levin and myself find it more difficult to deal with DOD. [Laughter.]

Senator LEVIN. Senator Cohen.

Senator COHEN. Mr. Chairman, a couple of observations.

One of the problems we have—and we still have counsel sitting in the room for OFPP—and it is not to draw lines, "us" against "them," or the Senate suddenly finding itself on the same side as business here. You said it was a unique experience that you came here today and were not on the end of a firing line. And we were struck with the irony that the Government itself, the executive branch, finds more objection to the Competition in Contract Act than does the business community itself. That is truly an irony from my perspective. I would have thought it would be precisely the opposite situation, where at least the two of you would be on the same side. And yet you come in and say the Competition in

Contracting Act is not the impediment to our access to contracts. So it struck both Senator Levin and myself as being quite ironic.

Going back to the 1980's, the birth of the legislation that Senator Levin and I have been involved with since we came to the Senate—we came together—and you said you hope you can come back next year and report that significant progress has been made; we hope that we can come back next year and be here to receive that testimony from you, since we both have to go out and engage in competition in the marketplace itself as well. [Laughter.] One of the things that we tried to address was prolific reports about fraud, waste and abuse. Those were the three key words that Senator Levin and myself were confronted with when we first became members of the Senate—so much pervasive fraud, waste, and abuse; Government was being ripped off by business and others.

And we said, well, how do we deal with this? Is it Government regulation? Do we sit here and start writing everything? We found, for example, that many times, contracts were being sole source. As I recall, the testimony was that something like 60 percent of all the contracts, certainly in DOD, were going by way of sole source contracting. Well, that's not really a very healthy system for us to have that many contracts go by sole source. We were concerned about the revolving door, people going into the Pentagon, going out, getting pretty high-paying jobs, maintaining their contacts, lining up contracts to go back through the network.

So we asked what is the best way to cure this. And Senator Levin, I call that Justice Holmes said the best test of truth is the ability of an idea to get itself accepted in the marketplace.

So we said, "How about more competition?" The only way you are really ever going to get a handle on costs, on fraud and waste, is to have greater competition. So we helped to write the Competition in Contracting Act, specifically designed to get more people involved, and that way, we would truly get reduction. And it has worked. What is ironic is it is something we have done that has actually produced significant savings to the taxpayer.

The problem is that then we find that we go perhaps to extremes. We go from one extreme, from fraud, waste, and abuse, and then we go to another extreme where we are writing so many regulations to prevent that that you get caught in the middle.

So I think that both of us feel there is some happy medium that has to be struck, because we don't want to find ourselves in a situation in which the pressure is on to take all of these reforms off that are "impediments" to the procurement process, and we are freezing businesses out of Government purchases and so forth.

I think both of us are open to any positive recommendations coming both from OFPP or GSA, to find out that we are all on the same side. We are trying to increase efficiency so we can compete with some very strong economic competitors on the scene, and who will be on the scene in the future, and that last thing we want is to start erecting boxes of regulations that are going to put you basically way behind the competitive ball.

And I frankly was pleased to have your group come in and say you think the CICA law is a favorable one and that you think we ought to keep it, you think we should not create wholesale exemptions from it, but rather, keep the pressure on for greater competi-

tion, but not allow contractors who see this as a way to make a quick dollar by saying, "Wait a minute—I can put that product together. Just give me 6 or 8 months. I can get a staff together, I can get some employees, I can get the equipment, I can get a bank loan. I can build you that product at one-third of the price or 25 percent of the price."

I have had experience with contractors—defense contractors—small contractors, who bid a very low price for an item, and along comes a contractor who has never been in the business before, who has never built this particular product, and who says, "I can do it better," and they find out that that person submitted a lower bid, had no experience, no background, no technological competence, but it was ruled or interpreted, because of the psychological factors involved, that we had to give that person the contract that was the lowest bid.

That is not what Senator Levin and I ever had in mind, that just because you've got a low bid that that means you get the contract. All of the other factors should have been applied—competence, track record, quality—in terms of whether the Government is getting the best deal for its money—because someone comes in with a low bid, and you find out that they cannot produce, and they then want another contract from the Government to help pay off the previous one that they didn't produce on, and you get locked into a vicious cycle, and ultimately you end up with no product, the company goes out of business, and the taxpayer has not benefitted.

So we welcome your indication that you are willing to work with OFPP, the "close encounter" group that has been developed, and Senator Levin and I stand ready to help in any way.

Thank you, Mr. Chairman.

Senator LEVIN. Thank you, Senator Cohen.

Just briefly, I think our goals here are very much the same. I think all the witnesses today and we have the same goals, which are to increase the use of commercial products. Surely, that is this panel's goal, and it is our goal up here, and we have acted to encourage it.

Competition, we have encouraged, with some real success, as Senator Cohen mentioned. I think we have almost doubled the number of contracts awarded competitively followed the Competition in Contracting Act, and the savings are really significant. So we are very pleased with that. We don't want to very readily waive it or give more exemptions to it. It is plenty flexible enough without just giving blanket authority to waive it.

In addition to trying to use competition, we want to increase the number of commercial products. There are two goals that are very much related. We are using taxpayers' money, so you have got to allow folks to compete who might be able to compete. We've got to be a little more careful using taxpayers' dollars than we would if we were in business—there are some requirements under the Constitution that we may even have that might not apply a private vendor—but not many. We can do a lot better, but there at least are some differences that are important.

But there is something else that is an impediment besides the fact that there are public funds being used here, and that is the

fact of just bureaucratic inertia—just plain, old bureaucratic inertia.

We had some interesting testimony today that agencies have the power to do some things in this area that they have not done, even though they admittedly have the power to do it—to clarify it, to issue new regs—they haven't done it. They want the Congress to do it, which is a much longer process usually than just doing it administratively.

It is ironic, by the way, because we have been accused of micromanaging and intruding where we needn't, and here is now a suggestion that we pass legislation, which is incredibly complicated legislation, let me assure you—these sweeping changes involve all kinds of committees in both Houses—but it is ironic that we are being asked to pass laws where laws are not needed by the witnesses' own testimony. Usually it is the other point being made, that we are passing too darned many laws—needless laws—and we shouldn't do that.

But we've got problems that we can cure, and in one way or another, we ought to cure them. We've got overspecifications, and we are going to continue to bang away to correct that. We've got requiring cost data which is not necessary in many cases—it is a deterrent, it is expensive, it costs a fortune. We are going to try to reduce the number of times that the agencies mandate cost data being supplied which serves no purpose except to make things more expensive and to delay things and to get people awfully frustrated out there in the commercial world, I've got to tell you—and to undermine confidence in Government.

We've got a big problem with confidence in Government in lots of ways these days. One of them is in the commercial procurement area. We've got plenty in the electoral area, too, in terms of ethics. But we've got a real problem in the procurement area, and we've got to address that problem of confidence in Government. It does not instill confidence in Government when Government requires a company to supply data with no reason. It just makes a mockery out of this system.

We've got inconsistent contract clauses.

Those are three of the problems that we have that we want to address. We've got the same agency, frequently, requiring contract clauses that not only aren't necessary, but inconsistent with another part of the same agency's requirements and surely inconsistent from other agencies' requirements, for the same product.

So we are going to continue to work hard on this. We've got a bill here which we are going to try to move promptly on. Your testimony, your involvement in this whole process has been very, very important. I think our agencies clearly, from today's testimony, indicate they want to cooperate, and we welcome that. This interaction is critically important.

We thank you. We thank all of our witnesses today for coming forward. And particularly we thank you for your eloquent testimony and your dramatic presentations.

Mr. BURKE. I knew I was keeping that around for something, Senator. Thank you very much.

Senator LEVIN. We were wondering what that was. We had some of the Capitol Police eyeing that a little suspiciously earlier. [Laughter.] Thanks so much.

We stand adjourned.

[Whereupon, at 4:02 p.m., the Subcommittee was adjourned.]

101ST CONGRESS
1ST SESSION

S. 1957

To provide for the efficient and cost effective acquisition of nondevelopmental items for Federal agencies, and for other purposes.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 21 (legislative day, NOVEMBER 6), 1989

Mr. LEVIN (for himself, Mr. COHEN, Mr. GLENN, and Mr. ROTH) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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A BILL

To provide for the efficient and cost effective acquisition of nondevelopmental items for Federal agencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Nondevelopmental Items Acquisition Act of 1989".

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—

(1) the acquisition of nondevelopmental items can lower Federal agency procurement costs by—

(A) reducing or eliminating the need for research and development;

(B) reducing acquisition lead time by making use of existing production lines and facilities; and

(C) opening competition for Federal agency contracts to thousands of manufacturers who sell products in the commercial market;

(2) Federal agencies continue to discourage the acquisition of nondevelopmental items by imposing complicated specifications on simple commercial and off-the-shelf products and by imposing burdensome contract requirements on the purchase of such products; and

(3) legislation is needed to reduce impediments to the acquisition of nondevelopmental items and encourage increased acquisition of such items.

(b) PURPOSE.—The purpose of this Act is to—

(1) establish a preference for the use of performance specifications and the acquisition of nondevelopmental items by Federal agencies;

(2) require training of appropriate personnel in the acquisition of nondevelopmental items;

(3) require Federal agencies to designate personnel responsible for promoting the acquisition of nonde-

velopmental items and challenging barriers to the acquisition of nondevelopmental items; and

(4) reduce regulatory impediments to the acquisition of nondevelopmental items by Federal agencies.

SEC. 3. NONDEVELOPMENTAL ITEMS.

(a) PREFERENCE.—(1) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended by inserting after section 303G the following new section:

"PROCUREMENT OF NONDEVELOPMENTAL ITEMS

"SEC. 303H. (a) The Federal Acquisition Regulation issued under section 25 (c) and (f) of the Office of Federal Procurement Policy Act (41 U.S.C. 421 (c) and (f)) shall ensure that, to the maximum extent practicable—

"(1) requirements of executive agencies with respect to a procurement of supplies are stated in terms of—

"(A) functions to be performed;

"(B) performance required; or

"(C) essential physical characteristics;

"(2) such requirements are defined so that non-developmental items may be procured to fulfill such requirements; and

"(3) such requirements are fulfilled through the procurement of nondevelopmental items.

"(b) As used in this section, the term 'nondevelopmental item' means—

"(1) any item of supply that is available in the commercial marketplace;

"(2) any previously developed item of supply that is in use by a department or agency of the United States, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;

"(3) any item of supply described in paragraph (1) or (2) that requires only minor modification in order to meet the requirements of the procuring agency; or

"(4) any item of supply that is being produced that does not meet the requirements of paragraph (1), (2), or (3) solely because the item—

"(A) is not yet in use; or

"(B) is not yet available in the commercial marketplace.".

(2) The table of contents for the Federal Property and Administrative Services Act of 1949 is amended by inserting after the item relating to section 303G the following:

"Sec. 303H. Procurement of nondevelopmental items.".

(b) TRAINING.—The Administrator of the Office of Federal Procurement Policy shall issue guidelines for the training by executive agencies of contracting officers, program managers, and other appropriate acquisition personnel in the ac-

quisition of nondevelopmental items. The guidelines shall provide, at a minimum, for training in the requirements of this section and the implementing regulations. In addition, the program shall provide for training of—

(1) contracting officers in the fundamental principles of price analysis and other alternative means of determining price reasonableness; and

(2) appropriate personnel in market research techniques and the drafting of functional and performance specifications.

(c) NONDEVELOPMENTAL ITEMS ADVOCATES.—Section 20(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 418(c)) is amended to read as follows:

"(c) The advocate for competition for each procuring activity shall be responsible for promoting the acquisition of nondevelopmental items and for challenging barriers to such acquisition, including unnecessarily detailed specifications, unnecessarily restrictive statements of need, and unnecessarily burdensome contract clauses.".

SEC. 4. COMMERCIAL PRODUCTS.

(a) REGULATIONS REQUIRED.—Within 270 days after the date of the enactment of this Act, Government-wide regulations governing the acquisition of commercial products shall be issued in the Federal Acquisition Regulation.

(b) CONTRACT AND SUBCONTRACT CLAUSES.—(1) The regulations prescribed under subsection (a) shall ensure that—

(A) a contract for the acquisition of commercial products includes only those clauses that—

(i) are on the list of contract clauses developed under paragraph (2)(A);

(ii) are included in the contractor's standard commercial order or invoice; or

(iii) are essential to the protection of the Federal Government's interest in that particular contract, as determined in writing by the contracting officer; and

(B) a prime contractor under a contract for the acquisition of commercial products is not required to include in subcontracts under such contract any clause other than those clauses that—

(i) are identified under paragraph (2)(A); or

(ii) are essential for the protection of the Federal Government's interest in such subcontract, as determined in writing by the contracting officer for such contract.

(2)(A) The Administrator of the Office of Federal Procurement Policy shall, in consultation with the heads of executive agencies—

(i) develop a list of contract clauses required for inclusion in contracts for the acquisition of commercial products, which shall include only those contract clauses that are—

(I) required to be included in such contracts by statute; or

(II) essential to the protection of the Federal Government's interest in such contracts; and

(ii) identify those contract clauses (on the list developed under clause (i) of this subparagraph) that prime contractors in contracts for commercial products are required to include in subcontracts under such contracts.

(B) The contract clauses identified under subparagraph (A)(ii) shall include only those contract clauses that are—

(i) required to be included in such subcontracts by statute; or

(ii) essential to the protection of the Federal Government's interest in such subcontracts.

(c) MODIFIED INSPECTION CLAUSE AND WARRANTIES.—The regulations prescribed under subsection (a) shall ensure, to the maximum extent practicable, that—

(1) a modified inspection clause is included in each agency contract for the acquisition of commercial products awarded to a contractor that has a proven record

of quality production and offer an appropriate warranty to protect the Federal Government's interest in acquiring a quality product; and

(2) applicable commercial warranties for the repair and replacement of commercial products are used by agencies for necessary repair and replacement of such products.

(d) COST OR PRICING DATA.—The regulations prescribed under subsection (a) shall ensure that, to the maximum extent practicable, pursuant to the exceptions in section 2306a(b)(1)(B) of title 10, United States Code, and section 304(d)(5)(A)(ii) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254(d)(5)(A)(ii)), no offeror, contractor, or subcontractor is required to submit certified cost or pricing data regarding any agency contract, or any subcontract under an agency contract for—

(1) the acquisition of a commercial product; or

(2) which the price agreed upon is based on adequate price competition.

unless the head of the agency determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract or subcontract, as the case may be.

(e) DEFINITION.—As used in this section, the term "commercial product" means any product, component of a

product, or modified version of a product that is or has been sold in substantial quantities to the general public.

SEC. 5. IMPLEMENTING REGULATIONS.

Within 270 days after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall prescribe regulations, guidelines, and contract clauses to carry out the provisions of this Act.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

NOT FOR RELEASE UNTIL
DELIVERY ON APRIL 26, 1990

STATEMENT

OF

ALLAN V. BURMAN

ADMINISTRATOR

OFFICE OF FEDERAL PROCUREMENT POLICY

before the

OVERSIGHT OF GOVERNMENT MANAGEMENT SUBCOMMITTEE

of the

GOVERNMENTAL AFFAIRS COMMITTEE

UNITED STATES SENATE

APRIL 26, 1990

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you to discuss commercial product acquisition. The Administration shares the Subcommittee's concerns in this area. Like you, we believe the Government incurs substantial productivity losses and cost increases when it fails to take full advantage of the large economies of scale, short delivery times, efficiencies and innovations that are available in the commercial market. In addition, when the Government fails to participate in the commercial market, our commercial product manufacturers are deprived of a very large on-shore customer. The hearings you held in May and June of last year served the important function of highlighting these issues for the public, Federal agencies and the Congress.

In your invitation to testify, you requested that I address the issues raised by S. 1957 and other proposals to remove impediments to the acquisition of commercial products by Federal agencies. As you know, on April 5, Secretary Cheney forwarded to the Congress the proposed Defense

Management Improvement Act, which in section 202 would authorize the use of commercial style buying practices. That provision was developed jointly by the Department of Defense (DoD) and the Office of Federal Procurement Policy (OFPP), and most of my testimony today is designed to explain section 202 and how the procedural reform sought under that section is essential to the accomplishment of the objectives of S. 1957.

I will begin with our analysis of why, despite recommendations that span almost twenty years, the Government has been unable to make greater progress toward improving its process for acquiring commercial products.

Symptoms - Over-specification and Paperwork Burdens
versus
Cause - Rigid Procurement Procedures

In the history of the Government's efforts to improve its commercial product buying practices, there have been periods of substantial activity, but not enough accomplishments. In my opinion, this issue has proven to be so difficult because too much attention has been given to symptoms rather than causes.

Increasing the Government's reliance on commercial products -- in place of custom designed ones -- and the use of commercial buying practices have been longstanding objectives in the Government. Nearly every major procurement study has so recommended. This goes back at least to the Commission on Government Procurement in 1972 and, more recently the Packard Commission in 1986 and Secretary Cheney's Defense Management Review of last summer.

The testimony provided at the hearings you held last spring confirmed our understanding that from suppliers' perspective, the major impediments to selling commercial products to the Government are the over-specification and burdensome data requirements typically imposed by the Government's current contracting processes. Complex contracts are another common complaint. But businesses readily acknowledge that the most unique and onerous of the provisions included in Government contracts stem from the Government's specification development and pricing practices. Inspection and documentation clauses are made necessary by the need to ensure compliance with the detailed specifications. And, audit clauses are made necessary by the need to ensure the accuracy of the certified cost, pricing or sales data so frequently required by the current contracting process.

From contracting officials' point of view, the major impediments to commercial product acquisition are different. They cite the difficulty of using currently authorized procedures to acquire commercial products that are suitable for agency needs within reasonable time frames. In addition, contracting officials are sensitive to the risk of criticism when they attempt to elevate quality factors such as performance, reliability, or technological superiority over price.

We do not believe either set of impediments -- those perceived by industry or those perceived by contracting officials -- can be cured simply by proscribing them in laws. They are symptoms of an underlying problem arising from an over-regulated contracting process, that mandates rigid procedures for how to conduct competitive procurements. That process was designed to buy Government unique items and weapon systems -- not commercial products. In order to successfully acquire commercial products, contracting officials should be seeking out and acquiring product quality -- rather than attempting to specify it. They need more efficient means for doing so and for structuring product purchases in ways that achieve the head-to-head competition that ensures reasonable prices without paperwork. The current procedural framework for conducting product acquisitions is too rigid to let this happen on a routine basis. It is that unnecessarily rigid procedural framework, which is imposed by a combination of longstanding taboos and statutory requirements, that is the cause of the Government's lack of progress in the commercial products area.

Much of the current procedural rigidity stems from two related views traditionally held by a significant segment of the procurement community and reinforced in statute. The first is that contracting officials should not interact too closely with commercial suppliers when developing specifications defining agency needs. This is grounded in part on the concern that the officials may be unduly influenced by the vendors' marketing techniques. And, since specifications development is not traditionally viewed as part of the formal competitive process, revising specifications to take account of knowledge gained through market research may be seen as evidence of bias. A related view is that the benefits of competition are maximized when the Government states its needs in sufficient detail for anyone wanting to manufacture the product to be able to do so -- thereby making price the only basis for competition.

Operating within these constraints and under the pressure to complete acquisitions in timely fashion, contracting officials are discouraged from exercising business judgment. Instead, they are driven to adopt, early

in the acquisition process, detailed specifications defining the agency's minimum needs. This approach falls squarely within traditional procurement norms and, at the same time, shortens the procurement cycle by limiting the scope of product evaluations and allowing contract awards to be based primarily, if not exclusively, on price. But, this traditional procurement model is the antithesis of commercial-style acquisition.

The traditional minimum-needs/low-price procurement model simply does not work in the commercial market, where manufacturers anticipate rather than follow customers' demands and where suppliers compete as vigorously on technology, performance and other aspects of quality as they do on price. The market rewards investment in successful innovation and manufacturers are under constant pressure to differentiate their products as well as lower their costs. The detailed specifications that are intrinsic to the traditional minimum-needs/low-price model disqualify many, and in many instances all, commercial products. Specifications further limit competition by prohibiting consideration of the higher performance, increased reliability, and other improvements continually being incorporated into products competing in the commercial market.

As the Defense Science Board explained in its report of last summer:

> When we focus on attempting to define minimum needs in detailed specifications -- rather than on determining how needs can be addressed by products already available in the commercial market--competition in areas other than price is limited. The only offerors who may want to compete are those willing to specially manufacture a product for the Government market. Many high-value commercial products that are suitable for the Government's needs may not address those needs in the precise ways contemplated by the Government's specifications writers. Moreover, the bias in the current acquisition system in favor of detailed specifications and low price awards serves to level any competitive advantages gained by the contractor's investment in innovations which improve performance or other aspects of quality. Where commercial products suitable for DoD's needs are available, the use of detailed specifications and over-emphasis on price is likely to disqualify commercial products and result in less, rather than more competition.

When the use of detailed specifications and emphasis on price operate to limit competition, the effects are magnified further by the paperwork the Government requires as a result. In such cases, the Government must require the submission of cost, pricing or sales data, and that further discourages companies with strong commercial markets from competing for Government sales. Compiling such data at the level of detail and according to the form required by the Government can be costly. One reason for this is that certification requirements impose a very high degree of care on contractors, requiring them to maintain expensive accounting systems and hire specialized accounting and legal expertise to ensure data are accurate and reported consistent with Government rules. Moreover, even with certified cost and pricing data, the contracting officer has little basis for determining what profit or price level is appropriate for the performance risk assumed by the contractor, or for the research and development investments that the contractor must make to remain competitive. Prices and profits are best determined by head-to-head competition.

Also, ensuring the accuracy of contractors' data require substantial Government resources. As the Packard Commission recommended, the Government should find ways to "let competitive forces provide a check on prices and direct its own attention to validating quality."

All too frequently, the bottom line is that many manufacturers are choosing to concentrate their efforts on maintaining their commercial competitiveness. Some have abandoned or are considering abandoning the Government market altogether. This limits the extent to which Government missions can benefit from agency acquisition of commercial products and, at the same time, deprives domestic commercial products manufacturers of a reliable and potentially large on-shore customer.

Commercial Buying Practices and The Competition in Contracting Act

In the commercial market two buying practices predominate. One -- private businesses consider commercial products whenever suitable ones are available and perform research as part of the specifications development process. Two -- private businesses choose products on the basis of the overall benefits they offer, which always involves a tradeoff among quality factors and price. These commercial practices allow private businesses to take maximum advantage of the broad-based quality and price competition and other benefits inherent in the commercial market -- economies of scale made possible by a large customer base, fast delivery of products

off existing production lines, and innovation and efficiency driven by market forces.

The Competition in Contracting Act (CICA) made it easier for contracting officials to base contract awards on factors relating to quality as well as on those relating to price.

However, CICA did not go far enough in giving contracting officials the procedural flexibility they need to make consideration of quality differences routine. This is essential to the Government's successful participation in the commercial market. The current procurement process followed under CICA is too rigid to accommodate efficient and effective research and evaluation of the many products of disparate quality competing head-to-head in the commercial market.

In particular, some in the procurement community continue to doubt whether commercial-market acceptance can be used as a criterion for initially screening products consistent with CICA's full and open competition mandate. The traditional approach has been for the Government to attempt to define its needs in sufficient detail to enable anyone to compete who can raise the necessary working capital to manufacture a product according to the Government's design.

This traditional procurement model is reflected in the statutes and regulations. The procedural framework outlined in CICA anticipates that market research, specifications development and product evaluation processes will be performed in series. For example, under CICA formal competition does not begin until the solicitation stage, and specifications development must be completed first. Accordingly, CICA does not allow acquisition officials to focus their specifications development efforts on a competitive field of products established on the basis of a product description and functional or performance specifications. Without a statute recognizing a legally acceptable means by which market research can be successfully integrated into the Government's traditional competitive process, contracting officials will continue to struggle with how to learn about and evaluate those new technologies and high utility features that are continually being generated by competition in the commercial market.

Moreover, CICA severely restricts the ways pre-qualified product lists may be used. If the rules for using such lists were made more flexible, they could be important tools for taking advantage of the time savings possible when purchasing products off the shelf. Such lists would also be useful for making contracting officials sufficiently familiar with

products so that those officials could better take differences among products into account when making repetitive purchases such as those for logistics support. We need to consider how such lists can be used in a manner that ensures efficiency without loss of competition. In fact, by facilitating the use of functional and performance specifications, such an approach can substantially increase competition.

Finally, according to the General Accounting Office's interpretation, CICA requires discussions to be conducted unless the low price offer is selected. As explained above, since commercial firms are constantly striving to differentiate their products, commercial products can differ significantly as to their technology, performance, reliability and other measures of quality. Moreover, when off-the-shelf products are being acquired it is not appropriate for offerors to propose new designs to respond to questions raised in discussions. Accordingly, in the commercial product context, always requiring discussions in the case of award to other than the low offeror unnecessarily lengthens the procurement cycle and improperly reinforces the traditional bias in favor of low price.

These problems build upon each another to create a very rigid procurement process that does not accommodate the efficient and effective acquisition of commercial products. Too often, it takes too long to complete a competitive negotiation, the only competitive process which CICA prescribes for use when the contracting officer determines it is appropriate to consider quality as well as price differences. Moreover, the current process often fails to capitalize on the vigorous competition inherent in commercial product acquisition because the process frequently can result in leveling the competitive advantages that commercial firms seek by investing in cost reduction, performance enhancements, or other improvements that differentiate their products.

We need to find the means to apply CICA's basic tenets -- full and open competition, fair treatment of competitors, and process integrity -- in ways that allow contracting officials to take advantage of the time savings possible from acquiring off-the-shelf products and of the competition that occurs among commercial firms in the race to distinguish and sell their products. We need a "Commercial CICA." Section 202 is designed to meet that need.

Commercial Style Acquisition
Under Section 202(d) of the
Proposed Defense Management Improvement Act

One of the broad goals of section 202 is to bring about a fundamental change of focus in the acquisition process, emphasizing market research in place of early specifications development. Further, section 202 recognizes that an efficient means for integrating market research into the conduct of quality evaluations is essential to a successful commercial products buying program. Section 202 is designed to provide contracting officials the procedural flexibility they need to bring about the required change of focus. In short, section 202 would provide contracting officials the flexibility they need to routinely adapt specifications to products available in the marketplace rather than require the marketplace to adapt to a Government specifications writer's idea of how a product should be designed and built.

If enacted, section 202 would provide contracting officials the procedural flexibility they need to routinely conduct and effectively utilize market research. More specifically, paragraph (d) of Section 202 would authorize commercial style competitive procedures, which would allow contracting officials to --

- o rely on a product's demonstrated success in the commercial market, in place of detailed specifications, as a criterion on initially screening products for consideration.

- o integrate market research into the specifications development, quality evaluation, and competition processes by conducting them concurrently, rather than in series as is done traditionally. This would allow contracting officials to refine specifications and evaluation schemes as part of a competitive process that takes into account product information submitted by the field of interested competitors. As a result, specifications could be used much more judiciously -- for the purpose of ensuring the products in the competitive field are suitable for agency use -- rather than attempting to describe fully in every detail products that meet the Government's minimum needs.

- o establish lists of pre-evaluated products in the case of repetitive acquisitions of the same types of products (such as those often conducted by the Defense Logistics Agency and General Services Administration). Those lists would remain open

but particular buys would not be delayed while a new product underwent evaluation.

- award contracts without conducting discussions to other than the low price offeror.

Acquiring Toasters and Fuel Oil
Under Section 202(d)

To help demonstrate the practical effect section 202 would have on how the Government acquires commercial products, I will briefly describe how two simple items--toasters and fuel oil -- could be purchased using the flexibility provided under section 202.

All acquisitions conducted under section 202 would begin with an inquiry to determine whether products suitable for the agency's needs were competitively available and sold in significant quantities. The products must be required by the agency in the same form as they are available in the commercial market or with only such minor modifications that would not alter their essential performance or functional characteristics. Contracting officials should have little trouble finding many potential sources for common commercial items such as toasters and fuel oil.

The next step would be to develop a product description to be used for advertising the procurement in the Commerce Business Daily (CBD). Since only products that have achieved commercial market acceptance, or have been successfully provided to the Government in the past, are eligible for consideration under section 202, the task of writing functional or performance requirements is made much simpler -- items falling below a minimum threshold of practical utility will be disqualified by their failure to achieve commercial market acceptance. For example, in the case of toasters we would hope to find that all toasters with commercial market acceptance would have basic operational features such as on/off and darkness controls and that those with very poor consistency of performance would have either lost or never attained market acceptance.

Our examples might be described functionally as follows: (1) an appliance for toasting slices of bread, and (2) oil for powering electric generators at Government facilities within a specified geographical boundary. Other details included or referenced by the notice would include the quantity or quantities, as in the case of fuel oil, that the Government expected to purchase and the preferred time and place of delivery. The notice would specify a deadline for interested offerors to submit information about the products they expected to offer.

After expiration of the period for interested offerors to make product information submissions, contracting officials would have a number of options for proceeding. In the case of toasters, the contracting officials might determine that no additional specifications were necessary and immediately issue solicitations to all offerors that were able to demonstrate their products had the necessary commercial market acceptance and conformed to the requirements of the notice. The solicitation would state the evaluation criteria to be used. The criteria would always include price along with the factors necessary to differentiate among varying levels of quality and the different approaches to achieve it. Contract award could be made expeditiously after receipt of offers since contracting officials would already be familiar with the varying quality levels available and no discussions would be required before selecting the toaster that offered the greatest overall benefits in terms of the evaluation criteria specified in the solicitation. For toasters, important quality factors might include the number of slices toasted at once, the amount of space required, the safety of the design, and the warranty offered.

Alternatively, the contracting officials might determine, after reviewing the product information submitted by interested competitors, that the practical utility provided by certain features was high enough to specify. The solicitation would still be issued to all interested offerors who were responsive to the notice but only those having the additional features specified would be considered in this later phase of the competition. In the toaster example, the contracting officials might determine that tne capability to toast four slices at once added great practical utility. Accordingly, only four-slice models would be considered in the final phase of competition. In all cases -- for toasters, fuel oil or any other item purchased using the procedures authorized by section 202 -- the ultimate tradeoff among quality factors and price would be made solely on the basis of the evaluation criteria set out in the solicitation, as is the case under CICA.

With regard to fuel oil, the contracting officer would have the option of establishing a list of suppliers under one Commerce Business Daily notice. This would allow purchases to be made on a repetitive basis throughout the year. The notice would set out the time period during which the solicitations were expected to be issued -- in the case of fuel oil, a year would be reasonable. We would also expect the contracting officer to make available to interested sources the acquisition plan, including approximate times that solicitations would be issued and approximate quantities that would be purchased at those times. There probably would

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be no need for adopting specifications in addition to commercial standards that would be referenced in the initial public notice. To the extent that performance differences were observed, a test program could be adopted to evaluate and consider those differences along with price.

All sources interested in offering a product qualifying under those commercial standards and thus being included on the list would periodically be issued solicitations or, if there were an excessive number of interested sources, the contracting officer would be authorized to rotate among smaller groups of sources on the list. Although the list would remain open, only interested sources responding at least a pre-announced number of days prior to the issuance of a particular solicitation would qualify to respond to that solicitation. In the case of commercial fuel oil, it should not take more than a few days to incorporate a new supplier on the list since compliance with commercial standards could be ensured through a warranty. A CBD notice would be published each time a contract was awarded to a source on the list. This would allow potential sources who missed the initial public notice to become aware of the sales activity occurring in connection with the list and to consider offering their products for inclusion on the list.

Comparison of Section 202 With S. 1957

S. 1957 would extend to the civilian agencies the requirements imposed by section 907 of the Fiscal Year 1987 Defense Authorization Act and section 824 of the Fiscal Year 1990 Defense Authorization Act. S. 1957 mirrors the section 907 provisions requiring a preference for nondevelopmental items and the section 824 provisions requiring development of a simplified uniform contract, a modified inspection clause and warranty provision, and a new cost and pricing data regulation. In addition, both S. 1957 and section 824 require the establishment of agency programs for training acquisition personnel in the purchase of nondevelopmental items. In general, we support the objectives of these provisions and believe they serve to complement the more fundamental reform we seek to achieve under section 202 of the proposed Defense Management Improvement Act. However, we do not believe the actions required by section 824 and S. 1957 are a substitute for the provisions in section 202. In addition, we are concerned that S. 1957 provisions and their defense counterparts attempt to improve commercial product acquisition by limiting rather than expanding contracting officers' discretion.

As already discussed, it is our view that the complex contracts, restrictive specifications, and burdensome data demands typically encountered by companies when they attempt

to sell products to the Government are symptoms of overly rigid acquisition procedures. Without procedural reform, we do not believe the Government will be able to solve the fundamental problem of how to conduct commercial product acquisitions efficiently and thus make them routine. Let me explain these points particularly with regard to the provisions of S. 1957.

Complex contracts. Complex contracts are frequently cited by commercial product manufacturers as impediments to Government sales. The development of a model uniform contract is a good idea, so long as it provides appropriate discretion for contracting officials to exercise business judgment and negotiate provisions addressing individual circumstances. The model contract will help ensure that contracting officials understand what is and what is not generally appropriate when commercial products are being bought. For example, the risks assumed by the contractor under the defense priority, unilateral changes, and termination for convenience clauses that are routinely included in large weapons system contracts may not be appropriate when purchasing specified quantities of commercial products off existing production lines at fixed prices. However, while the Government's exercise of its rights under such clauses can significantly delay and disrupt a commercial manufacturer's operations, these are not the contract provisions most often cited as paramount among the provisions discouraging participation by commercial product suppliers.

The major provisions most often cited by industry are the clauses related to the Government's specification and price analysis practices. As previously stated, section 202 addresses these principal impediments by providing contracting officials efficient means for purchasing products without relying on detailed specifications. Section 202 would thereby ensure the vigorous competition that is the best way to establish reasonable prices. Second in importance to those issues are the extraordinary performance obligations, usually with regard to trade, labor, or other socio-economic issues, that apply to firms that sell products to the Government. Section 202 addresses these issues by providing an exemption from many such unique performance obligations, except certain provisions regarding nondiscrimination and labor standards.

S. 1957 recognizes the importance of the specification and pricing issues and singles out the inspection and related warranty provisions and the cost and price data regulations for special attention. However, to be most effective in improving the procurement environment for commercial

products, the S. 1957 provisions should be coupled with the procedural reform sought under paragraph (d) of section 202.

Specifications. S. 1957 seeks to reduce over-specification and paperwork burdens without changing the procedures by which contracting officials conduct product competitions. While S. 1957 may succeed in reducing some of the over-specification and data demands that are the symptoms of a flawed commercial products acquisition process, more needs to be done to allow contracting officials to achieve the kind of commercial style competition that will substantially improve that process.

Section 3 of S. 1957, like its defense predecessor section 907, calls on executive agencies to state their requirements in terms of functions to be performed, performance required, or essential physical characteristics. In section 4(c), however, S. 1957 takes a different tack, seeming to presume that detailed specifications will continue to be widely used, and calling for modified inspection and warranty provisions. What is needed, in our view, is a commercial style competitive process that dispenses with the need for detailed specifications altogether. Paragraph (d) of section 202 authorizes such a process.

Contracting officers will have a difficult time implementing the S. 1957 preference for functional and performance requirements unless they also are given more procedural flexibility. They need efficient and effective procedures for eliminating unacceptable products from the field of competition, differentiating among products varying in terms of technology, performance, and other factors related to quality, and selecting those offering the greatest benefits in terms of the tradeoff among quality factors and price. S. 1957 does not clarify how contracting officials will, consistent with current law --

- o determine whether the products that qualify under functional and performance-based standards are in fact suitable for the Government's intended use;
- o select from among the many commercial products that may be found acceptable the product offering the greatest benefits;
- o ensure the price paid for the product selected is reasonable; and
- o ensure those suitability and selection determinations can be made in time to support agency missions.

Most contracting officials understand the benefits of functional and performance specifications. It is, as previously noted, the rigidity of currently authorized competitive procedures that require contracting officials to resort to detailed specifications. While they may disqualify many commercial products, detailed specifications at least allow the process of advertising for bids and awarding contracts to be accomplished within reasonable time frames--it is easy to evaluate offers when price is the only factor.

Section 202(d) is designed to give contracting officials the procedural flexibility they need to take advantage of the competition enhancing potential of functional and performance specifications as envisioned by S. 1957. As described above, Section 202(d) would give contracting officials a pragmatic means for doing so by --

- o relying on commercial market acceptance,
- o integrating market research into the traditional competitive procurement process in a way that enables efficient consideration of products of different quality,
- o establishing lists of sources of pre-evaluated products to receive solicitations, and
- o dispensing with discussions when they will serve no useful purpose.

These practices give contracting officials an efficient means for evaluating commercial products of varying quality and choosing from among them those that provide the greatest benefits to the Government in terms of quality factors and price, and to do so within reasonable time frames without resorting to detailed specifications. Since only a few, if any, detailed design specifications would be necessary, the Government would generally not need to inspect products during production.

Cost, Pricing and Sales Data. As we understand S. 1957, it would not significantly affect contracting officials' responsibility to obtain certified cost and pricing data. On the one hand, S. 1957 does not waive the Truth in Negotiations Act (TINA) requirement that contracting officials must obtain certified cost and pricing data for any contract in excess of $100,000, unless certain exceptions apply. The TINA exceptions include cases where prices can be based on adequate price competition or catalogue or market sales prices. In a sense, section 4(d) of S. 1957 reinforces the cost and pricing data requirement in that it directs

regulations to be promulgated pursuant to those exceptions. On the other hand, the regulations called for by subsection 4(d) are to require the agency head to determine that cost and pricing data are necessary before such data can be required when commercial products are being acquired. Presumably the agency head may delegate that authority down to at least the level above the contracting officer.

We interpret section 4(d) to require extraordinary approval when a contracting officer decides to request cost and pricing data notwithstanding a determination that an exception applies. This situation should be rare since in cases where an exception applies, cost and pricing data are not necessary for the purpose of determining price reasonableness. In such cases, the only reason to require them is to determine whether the contractor's manufacturing plan is realistic and that is not necessary where off-the-shelf products are being acquired.

As we understand the problem, it is that contracting officers are having difficulty justifying application of the statutory exceptions, not that they are demanding cost and pricing data pursuant to the TINA exceptions. And, for an exception to apply, the contracting officer must either determine that adequate price competition exists or obtain sales data demonstrating substantial commercial sales at catalogue or market prices. S. 1957 will not solve this problem.

Section 202(d), on the other hand, provides contracting officials with sufficient procedural flexibility to avoid the over-specification that limits competition, which is the best means for ensuring price reasonableness. When using the commercial style procedures authorized by section 202, there should not be a need for any data relating to costs or prices, since all procurements conducted under section 202 will be competitive.

I note that pursuant to section 824, DoD is well along toward the development of proposed modifications to the Federal Acquisition Regulation which will reduce the amount of sales data necessary to support application of the catalogue and market price exemption in cases where competition cannot be achieved. That situation would occur much less frequently if section 202(d) were enacted.

The procedures authorized by section 202(d) are designed to make it easy to use functional and performance specifications and, therefore, are to be used only when the products being acquired are competitively available. As a result, there will be no need for contracting officials to request cost, pricing or sales data to justify the

reasonableness of prices. Thus, by removing rigidity from the current procedural framework and allowing contracting officials to exercise more business judgment, section 202 cures the cause of the over-specification and burdensome paperwork requirements that are symptomatic of that rigidity, and perceived by industry as the major impediments to selling commercial products to the Government.

Exemption From Laws Prescribing Sources and Unique Performance Requirements and Anticipated Effects on Small Businesses

Section 202 would exempt commercial product procurements from the various provisions of law that operate directly to limit competition by prescribing preferred or mandated sources. For example, under paragraphs (e) and (f) of section 202, acquisitions would be exempt from the provisions in the Federal Acquisition Regulation that provide for set-asides for small businesses by artificially limiting the competition when two or more responsible small businesses submit reasonably priced offers. However, as explained below, the opportunities for small businesses to participate in the Government market should be significantly enhanced overall, under section 202. Moreover, nothing in section 202 affects the goals that agencies must develop to ensure extensive small business participation.

Paragraphs (e) and (f) of section 202 also would exempt commercial product procurements from those provisions that make contract terms and conditions and performance requirements applicable simply because the Government is the buyer. These provisions discourage or disqualify many commercial sources from competing for Government contracts and increase the cost of the products acquired by the Government. With certain exceptions for the executive orders and statutes prohibiting employment discrimination by Government contractors and prescribing fair labor standards, section 202(e) and (f) will allow commercial product manufacturers to sell their products to the Government without adopting specialized business practices differing from those that generally regulate commercial business operations.

Small businesses are especially sensitive to the long lead times, paperwork burdens, and specialized business practices imposed by the current contracting process. Unlike large companies, small businesses usually do not have the sales volume to maintain two production lines, one for their commercial and another for their Government customers. In addition, small businesses are frequently the source of technologically advanced products which may be disqualified

or undervalued under the traditional minimum-needs/low-price procurement model. The lead-time and paperwork reductions possible under the streamlined competitive procedures, especially under the provision allowing the establishment of open lists of sources assured of receiving all solicitations for particular types of products, should make it much easier for small businesses to participate in Government procurements. Overall, we would expect that small business participation in procurements conducted under the commercial style procedures authorized by proposed section 202 would be significantly higher than in those conducted under other procedures.

Contracting Officer Discretion
and
Intra-agency Protest Process Test

Section 202 would encourage contracting officers to exercise the business judgment necessary to successfully acquire commercial products and, at the same time, it would minimize opportunities for improper manipulation of the specifications development process. The improved support for agency programs and product innovation and the increased contracting officer discretion and accountability that would be achieved under section 202 further major Packard Commission themes.

Contracting officers would, of course, be required as they are today, to explain the reasons for their product selections based on evaluation factors specified in the solicitation. Managers would be expected to deal with the exercise of poor judgment through the personnel management and performance evaluation systems. And, prosecutors would be expected to enforce the civil and criminal penalties provided for in the case of conflict of interest. Moreover, by making specifications development part of the formal competitive process, section 202 would raise the visibility of decisions to adopt specifications that eliminate products from the competition. Contracting officials would be expected to be able to explain the rationale for their decisions in terms of practical utility or other proper grounds. As a result, improper manipulation of tne competitive process would be made more difficult.

Section 202 purposely diverges from past procurement reform efforts in that it relies on good personnel management and strong ethics practices _rather_ than on laws and regulations. It is those laws and regulations that have created the rigidity which prohibits the Government from effectively participating in the commercial market. Rules directing how contracting officers are to make business judgments cannot anticipate the full range of circumstances

that will be encountered. Accordingly, in the context of a free market economy, the Government's procurement rules frequently sweep too broadly and favor simplistic analyses that overemphasize price. The competition among commercial products is complex. Taking advantage of that competition requires initiative, imagination and the exercise of professional business judgment that cannot be practically prescribed in rules or formulas or programmed into computers.

Section 202 recognizes that the best way to guard against abuse is to make the acquisition process transparent, reward acquisition officials for their successes, appropriately penalize them for their failures, and support their business decisions so long as they are reasonable. Under section 202, contracting officials would remain accountable for the prices paid under contracts. But, they would also have sufficient discretion to be held accountable for failing to exercise the judgment necessary to ensure that the contracting process achieved its primary purpose -- effective support for agency missions.

Section 202 would also allow DoD to test a different approach to protests that would complement the increased discretion and accountability inherent in the commercial style procedures authorized by paragraph (d). Selected DoD components would be authorized to conduct a three-year test of an intra-agency protest process to be substituted for the current General Accounting Office and General Services Administration Board of Contract Appeal processes. This intra-agency process would provide for a prompt, impartial, high-level review of procurement actions. Appeal to the courts would remain available but, as in the case of regulatory actions, we would expect the courts to base their review on the administrative record and give deference to contracting officers' business decisions so long as they had a rational basis.

These high-level protest reviews could go a long way toward boosting contracting officials confidence to exercise business judgment and make the job attractive to professionally qualified individuals. Moreover, the intra-agency process more closely resembles commercial business practice. Commercial businesses generally first take their grievances to their suppliers' management. Referral of disputes for resolution by independent outside parties other than the courts is used only when both buyer and seller believe that such a procedure would be productive and mutually agree to it. Similarly, the intra-agency protest procedure would complement the agency's internal performance evaluation process for contracting officials by giving disappointed offerors a clear and efficient avenue for

obtaining high level agency review of a contracting officer's individual procurement actions.

The test would determine whether disappointed offerors would find the intra-agency protest process more advantageous than the administrative remedies currently available in forums outside the agency. In theory, protesters should find that the intra-agency process is more informal and expeditious and that agency deciding officials understand better than outside reviewers the context in which the procurement is being conducted.

Outside the selected DoD components authorized to conduct the test, the current protest processes would remain available to offerors who believe the contracting officer's exercise of business judgment is without a rational basis. However, we would expect the various protest forums to recognize that the intent of section 202 is to increase contracting officers' ability to exercise business judgment and, therefore, give appropriate deference to their conduct of the commercial style competitions that would be authorized by paragraph (d).

Multiple Award Schedule Program

The General Services Administration (GSA) awards schedule contracts to various vendors for commercial-type items (e.g., office equipment, laboratory supplies, furniture, cleaning equipment, electronic devices). Other Federal agencies place orders under these schedules directly with the vendors at the prices negotiated by GSA. The schedules are an excellent contracting tool, but some major vendors have complained to OFPP about the procedures used by GSA in negotiating contract prices. The vendors state that the information and certifications required by GSA lack practical utility, are extremely burdensome and costly to prepare and are inconsistent with the Paperwork Reduction Act. One of our roles is to reduce unnecessary reporting burdens associated with the procurement process. Although we have discussed with GSA ideas for improving the Multiple Award Schedule program, I have no specific solutions or recommendations at this time. We will, however, continue our effort with both GSA and industry.

Conclusion

I will close by explaining why the commercial products legislative effort continues to be a high priority for OFPP and to be so despite the difficulty of achieving understanding and political consensus on the issues. The reason is that the legislation has the potential to make

significant contributions to further some broad national interests.

By giving agencies an efficient means for acquiring commercial products, section 202 would allow agencies to do more with less and that is the least painful way to meet budget objectives.

The Government needs to be able to capitalize on commercially developed technology. The pace of technological advance is accelerating across a broad spectrum of products, outstripping the Government's specification-writing capabilities. By providing the Government with an efficient means for learning about and using state-of-the-art commercial technology, the Government's research and development and specification writing resources can be concentrated in areas not being addressed commercially.

Finally, from a broad economic perspective, the proposal could contribute to a substantially larger on-shore market for commercially developed high technology products and thereby improve the competitiveness of domestic manufacturers.

Those potential benefits are impressive enough to make commercial products a landmark piece of legislation with substantial benefits for the Federal taxpayer and industry as well as the Federal Government.

STATEMENT OF

RICHARD G. AUSTIN

ACTING ADMINISTRATOR

GENERAL SERVICES ADMINISTRATION

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

APRIL 26, 1990

Mr. Chairman and Members of the Subcommittee:

I am pleased to present the views of the General Services Administration (GSA) on S.1957, a bill which is intended to facilitate the acquisition of nondevelopmental items and commercial products by Federal agencies. The bill would extend, with some modification, certain requirements regarding nondevelopmental items and commercial products currently applicable to defense-related agencies subject to the Armed Services Procurement Act and to civilian agencies subject to the Federal Property and Administrative Services Act of 1949 (Property Act).

S.1957 would amend the Property Act to maximize the use of functional and performance oriented specifications in the acquisition of nondevelopmental items. A nondevelopmental item is defined as an item of supply already available in the commercial marketplace or any previously developed item of supply in use by a public agency. The term also includes previously developed, items which are not yet in use or available in the commercial marketplace.

The bill would further require the Office of Federal Procurement Policy (OFPP), to provide agencies with guidelines for training on the acquisition of nondevelopmental items, including such topics as price analysis, market research techniques, and

drafting specifications. Additionally, the bill would amend the OFPP Act to require agency competition advocates to assume the additional responsibility for promoting, and challenging barriers to, acquisition of nondevelopmental items.

S.1957 also deals with the acquisition of commercial products, defined as any product, component, or modification thereof, that is or has been sold in substantial quantities to the general public. The bill would require the issuance of an amendment to the Federal Acquisition Regulation (FAR) to limit contract clauses for a commercial product to those: (1) included on a list of such clauses developed by OFPP including all clauses required by statute; (2) included in the contractors standard commercial order of invoice; or (3) determined in writing by the contracting officer to be essential to the protection of the government's interest in that particular contract.

The implementing FAR would further prohibit an agency from requiring a prime contractor to include in a subcontract under a commercial product contract any clause not permitted in the prime contract or not determined to be essential by the contracting officer. In accordance with the bill, the FAR also would provide for the use of commercial warranties and a modified inspection clause for those vendors of commercial products that have a proven record of quality production and offer an appropriate warranty.

Finally, regulations issued under the bill would ensure that to the maximum extent practical, pursuant to existing law, no offeror is required to submit certified cost or pricing data under a contract for the acquisition of a commercial product or for which the agreed upon price is based on adequate price competition.

The General Services Administration supports the intent of S. 1957 to promote and facilitate the efficient and economic purchase of commercial products. This intent is consistent with current Congressional and Executive branch policy and GSA program objectives.

As a major procurer of common use supplies and services for the Federal government, GSA over the last 10 years has engaged in a concentrated effort to structure its programs to maximize use of commercially available products in support of our customers.

I would like to highlight a few of our accomplishments which relate directly to those requirements contained in S.1957.

GSA policy and practice conform to existing statutory and Executive branch guidance on maximizing the acquisition of commercial products and the use of functional specifications when appropriate to the subject matter of the acquisition. For example, the Federal Standardization Handbook issued by GSA for use by all Federal agencies requires that agencies purchase commercial products and use commercial distribution systems

whenever such products or systems adequately satisfy the Government's needs. The handbook provides an order of preference for use of non-government product standards, commercial item descriptions and Federal specifications.

Most agency requirements for common-use items can be met through the procurement of commercial products. Consequently, GSA has developed procurement programs to take advantage of these markets. GSA's Schedules Programs are designed specifically to make commercial off-the-shelf and commercial-type items available to customer agencies. The programs makes maximum use of the suppliers' stocking, inspection, and distribution systems. The program even takes advantage of a payment alternative recognized in the commercial marketplace, namely the credit card.

A component of the Schedules Program is the series of multiple award schedules. The multiple awards schedules are agreements with vendors for commercially available products and services. Agencies place orders directly with vendors in accordance with schedule prices, terms and conditions negotiated by GSA. The prices are normally based on discounts from vendors' commercial catalog prices. The multiple award schedules program has been in existence for many years and embodies many features of commercial buying practices favored by S.1957. Over the past 10 years, GSA has devoted considerable effort to improving the multiple award schedules. The Subcommittee has asked if we have any specific recommendations for improvement. While we have none for the Subcommittee at this time, GSA continues to review this program

and consider ideas for improvements that will make the program more useful to our customer agencies.

With respect to requirement descriptions, GSA relies primarily on simplified generic product descriptions and functional and performance specifications. For example, GSA has developed approximately 1600 commercial item descriptions (CIDs), the majority of which replaced Federal design specifications. For the past 5 years GSA has averaged 60 new CIDs a year, most of which were converted from design specifications.

In negotiating contracts for commercial products, GSA also conforms to statutory and regulatory requirements relating to obtaining cost and pricing data. In view of the nature of what we buy and the methods by which we purchase, GSA rarely requires the submission of cost and pricing data. For example, consistent with existing law, we do not obtain cost or pricing data where there is adequate price competition or where the offered price is based on a catalog or market price for a commercial product. In certain GSA procurements we do, however, obtain information pertaining to commercial sales in order to satisfy the requirement for securing cost and pricing data and to aid in negotiating favorable prices.

GSA recognized years ago that in the commercial products and services environment price analysis techniques are usually more pertinent than cost analysis techniques. Accordingly, we developed training programs specifically oriented to price analysis which are available government-wide. We have also

developed Price Analysis Guides for contracting officers to use as a desk reference. This publication has been shared with contracting officers of other civilian agencies.

With respect to inspection, GSA has established programs for commercial products which rely on the demonstrated merchantability of the commercial product or vendor inspections, where a supplier has proven its internal quality control mechanisms.

These examples illustrate GSA's ongoing efforts to improve the efficiency and economy of the Federal procurement system by relying on commercial products to the maximum extent practical and creating a procurement environment which is conducive to their acquisition.

Nonetheless, we recognize that additional steps can be taken to facilitate the acquisition of commercial products. OFPP has a number of ideas in this regard and we look forward to working in support of OFPP's efforts.

Similarly, we appreciate any legislative or regulatory initiative which simplifies the procurement of commercial products. S.1957 appears to be directed toward such improvements. At the same time, however, we want to make sure that any improvements do not unintentionally disrupt activities which are currently successful. With this in mind, GSA offers a number of suggestions for S.1957.

First, the types of contract clauses required to be contained in contracts must permit sufficient flexibility for the use of commodity specific clauses. Second, these clauses should not be solely oriented to the types of clauses used by commercial sellers in their purchase orders but should also include clauses used by commercial buyers. Third, the definition of a commercial product should be consistent with currently prescribed definitions. Fourth, the bill should preserve the GSA Administrator's authorities with respect to ADP and telecommunications procurement under the Brooks Act. Lastly, ambiguities in the bill's provisions requiring the development of contract clauses should be clarified.

I have provided a more detailed discussion of these concerns as an attachment to my statement. I would be happy to respond to any questions that you may have.

SECTION-BY-SECTION ANALYSIS OF S.1957
TO ACCOMPANY
THE STATEMENT OF RICHARD G. AUSTIN
PREPARED FOR
THE COMMITTEE ON GOVERNMENT AFFAIRS
UNITED STATES SENATE
APRIL 26, 1990

COMMODITY SPECIFIC CLAUSE

Subsection 4(b) of S.1957 permits individual contracting officers to determine whether additional clauses are necessary for a particular contract to protect the Government's interest if the clauses identified by the OFPP are insufficient. This wide discretion could adversely effect GSA's ability to fulfill its mission requirements. It is unlikely that the OFPP list will include all clauses necessary for the hundreds of commodity types currently procured by Federal agencies. It also is unlikely that the list will reflect all of the procurement mechanisms available for the acquisition of commercial products. Consequently, the bill should permit agencies to identify commodity unique clauses on a class basis and not leave this to the discretion of individual contracting officers.

SELLER VS. BUYER CLAUSES

Subsection 4(b) also permits contracting officers to use which clauses to be used if they are included in a contractor's standard commercial order or invoice. The implication of this provision appears to be that only those clauses offered by sellers as a matter of adhesion in their standard purchase order

forms should be used as the commercial model. We would suggest that the bill also identify for inclusion in Federal contracts those clauses used by commercial buyers. In general, sellers in superior negotiating positions are successful in insisting on the use of terms that benefit the seller, just as buyers who are in a superior negotiating position can be equally successful in insisting on use of clauses that benefit the buyer. The Government should not be placed in a disadvantageous position for acquisition of commercial products by virture of considering only the perspective of commercial sellers.

CLAUSE DEVELOPMENT

The provisions of subsection 4(b) regarding clauses to be included are ambiguous. If the intent of the subsection is to authorize OFPP to waive contract clauses which would otherwise be statutorily required, this waiver authority should be stated in the bill. In addition, it is not clear as to whether regulations must provide, in the disjunctive, for inclusion of 1) only the clauses listed by OFPP; 2) clauses from a contractor's standard commercial order or invoice; or 3) those clauses essential to protect the government's interest as identified by the contracting officer.

DEFINITION OF COMMERCIAL PRODUCTS

Subsection 4 (e) defines commercial products as any product, component of a product, or modified version of a product that is or has been sold in substantial quantities to the general

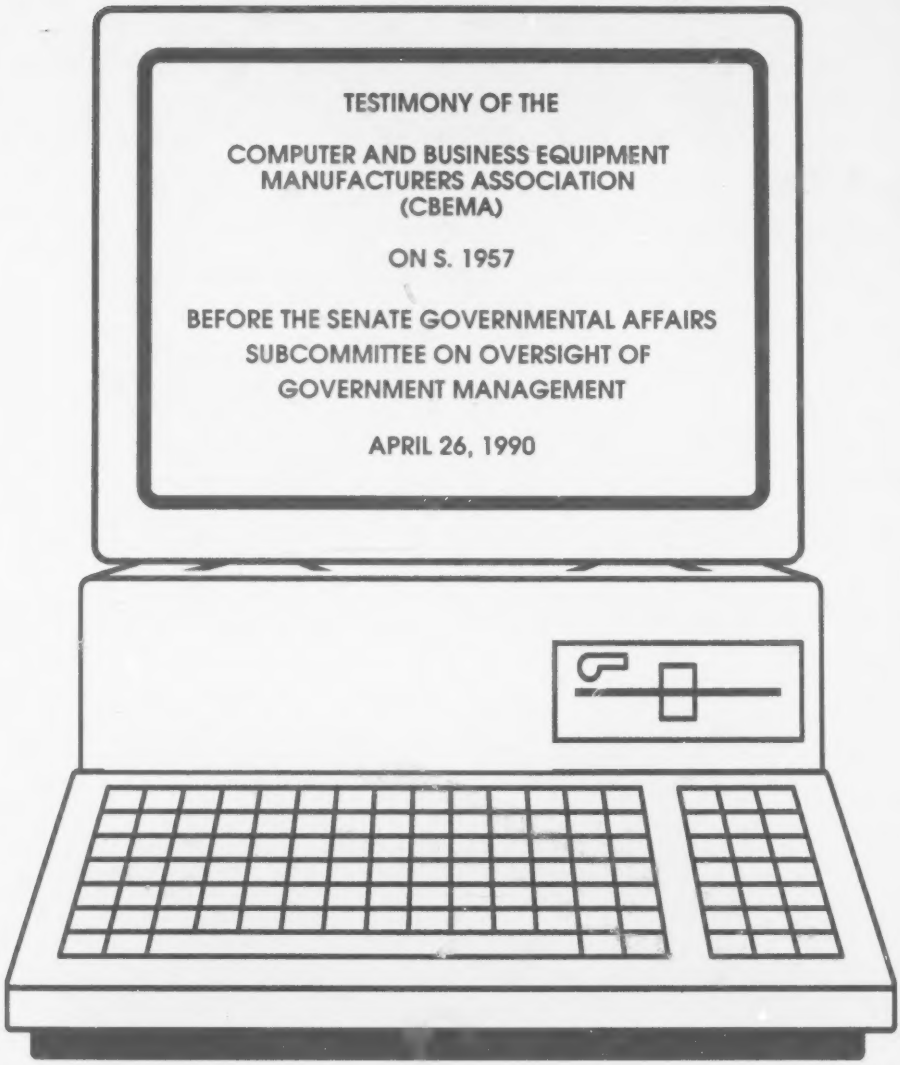
public. We recommend that this definition be modified. The principal basis used assure that the price and quality of commercial products are appropriate is to rely on the operation of the commercial marketplace. If substantial numbers of commercial entities are willing to buy a product, we have assurance of its merchantability. Likewise, we are assured that the price paid is reasonable, and we can use the prices commercial buyers pay as a basis for comparison with the price we pay. As written, S.1957 identifies as commercial products those items that have been sold in the commercial market places without any requirement as to the currency of those sales.

GSA supports only the inclusion of products in a definition of commercial product that are currently being sold in substantial quantities to the general public.

GSA AUTHORITY UNDER THE BROOKS ACT (40 U.S.C. 759)

The bill authorizes OFPP to identify clauses appropriate for inclusion in contracts for commercial products. Additionally, the bill would require regulatory implementation in the Federal Acquisition Regulation. We are concerned that the bill could be construed to obviate the exclusive authorities of the Administrator of General Services with respect to Automated Data Processing Equipment, including telecommunications, under the Brooks Act (section 111 of the Federal Property and Administrative Services Act of 1949 40 U.S.C. 759). To preclude

such an unintended interpretation, the bill should be revised to state that nothing in the Act is intended to modify the exclusive authority of the Administrator contained in section 111 of the Federal Property and Administrative Services Act of 1949.


TESTIMONY OF THE
COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION (CBEMA)
ON S. 1957
BEFORE THE SENATE GOVERNMENTAL AFFAIRS SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT
APRIL 26, 1990

Computer and Business Equipment Manufacturers Association
311 First Street, N.W., Suite 500 Washington, D.C. 20001 202/626-5752

CBEMA Testimony on S. 1957

April 26, 1990

Executive Summary

The Computer and Business Equipment Manufacturers Association is comprised of companies which develop and sell commercial solutions to both government and commercial customers. Consequently, we evaluated S.1957 in terms of its ability to reform the federal procurement system to maximize the opportunities for commercial vendors to compete using simplified contracting procedures found in the commercial marketplace.

S. 1957 does this -- to a degree. It is an excellent platform on which to build consistent and clear direction. We recommend additions and modifications to the bill, such as policy guidance to manage the differences between "commercial" products and other nondevelopmental items, a framework for data base management and guidelines on when to require cost or pricing data.

With respect to the Defense Management Improvement Act, CBEMA recommends each section be evaluated on its own merits because the proposed changes are too sweeping to be accepted in their entirety. Many commercial product procurement problems identified by industry have not been addressed in the Defense Management Improvement Act.

Finally, we comment on the Multiple Award Schedule system which CBEMA has long regarded as potentially the best framework for Government adaptation of simplified contracting procedures. However, the current MAS policy requires evidence of commerciality, but then uses a schedule contract without standard commercial terms, and without using standard commercial negotiating techniques. In this business environment, many benefits of commercial contracting are lost.

In closing, we urge the Congress to intensify its efforts at the public policy level toward a more simplified contract form and procedures. S. 1957 should serve as the nucleus of that effort.

INTRODUCTION

Good afternoon. Mr. Chairman, I am David J. Burke, Federal Policy Manager, Digital Equipment Corporation, appearing today on behalf of The Computer and Business Equipment Manufacturers Association (CBEMA). With me today are Thomas A. Ryan, Manager, Government Sector Marketing and Policy, Xerox Corporation, and Ronald W. Gallier, Vice President of Government Relations for Multigraphics. Tom Ryan chairs CBEMA's Government Procurement Committee, and Ron Gallier is a longtime member of the CBEMA Board of Directors.

CBEMA represents the leading edge of American high technology companies in computers, business equipment, telecommunications, and related software and services. Our members had combined sales of more than $250 billion in 1989, representing 4.8% of our nation's gross national product, most of which were commercial goods and services. We employ more than 1.5 million people in the United States and perform over one-fifth of all U.S. industrial research and development.

CBEMA is comprised of companies who develop and sell commercial solutions to both government and commercial customers. While most of our members can and occasionally do build to specification or sell customized systems, their main business is commercial. Consequently, the Association places a high value on reforming the federal procurement system to maximize the opportunities for commercial vendors to compete using simplified contracting procedures found in the commercial marketplace or, put another way, to make it easier for the Government

program manager and contracting officer to go for the commercial solution. We believe that the principal reason why procurement reform as we define it is so difficult to implement is because the existing Federal Acquisition Regulation (FAR) system does not provide a strong and clear direction. What commercial contracting guidelines exist are inconsistent and ineffective. At Attachment Two we have provided your Subcommittee with a recent analysis outlining problems with the FAR system as it is currently practiced.

Before we address our specific recommendations, Mr. Chairman, our Association wishes to thank the Subcommittee for its continuing and vital role in acquisition policy matters, particularly as these policies affect the procurement of commercial products and other nondevelopmental (NDI) items. We take note of the personal efforts of Senator Levin in sponsoring legislation in the FY90-91 Defense Authorization Act to simplify the DoD contracting process as it applies to commercial product acquisition. We are concerned, however, that the DoD is fast approaching the end of May-- the time by which the new commercial product acquisition regulations should be published for public comment. We urge this Subcommittee to maintain its interest in the issue.

PROCUREMENT EXAMPLES

In preparing for today's appearance, we were struck by how little progress has been made at the operational level as a result of changes initiated by Congress since 1986 with respect to commercial and NDI

procurement. We still encounter unique contract clauses, burdensome data requirements and unnecessary certifications and protracted time spans between issuance of an RFP and contract award. Consider the following examples:

Example 1:

> Every year the GSA purchases a simple 4"x4" cotton pad that is used in Government printing plants and in every commercial printing plant in the world. This simple product is sold by virtually every printing and graphics supplier; however, to our knowledge, the product is manufactured exclusively by one manufacturer. The manufacturer supplies the pads to vendors who, in turn, respond to Government invitations to bid. The GSA purchases these pads by sealed bid using a commercial item description.
>
> Also included in the invitation to bid is a requirement for the Government to inspect supplies.
>
> Of all bids received, in one of the annual bid cycles, the lowest price bid was determined by the Government to be non-responsible because no testing was done by the bidder, nor did the bidder have a facility for testing. The award was made to a higher-priced bidder. The basis for the determination was FAR 9.104, which says, ". . . have the necessary production, construction, and technical equipment and the facilities or the ability to obtain them."
>
> In a protest action, the rejected bidder learned that
>
> > ". . . (the bidder) does not have the technical capability or personnel to determine contract item conformance . . . (or) a quality control department or a written control manual that describes their inspection system . . ."
>
> The test -- for which a facility, manual and trained personnel were required by regulation -- consisted of dropping a pad into a container of distilled water in which it should sink within 30 seconds and the water extracted from the pad must test out between 5 and 8 on the pH scale.

Comment: The point of this case is that absolute and total conformance to any regulation can lead to absurdities. Contracting officers must be allowed latitude and be encouraged to make judgments, particularly when purchasing commercial products. The stringency with which FAR 9.104 was applied in this case caused bidders to incur additional, but unnecessary, costs for testing procedures and the development of a written quality control manual for a test which is tantamount to dropping a cotton pad in a bowl of water and testing the pH value with a litmus strip.

Example 2:

> In another solicitation for the acquisition of commercial products, the Government insists that individual bottles of copier toner be relabeled with government nomenclature. The government will not accept alternate solutions such as labeling of the carton. Annually, the respondent produces approximately 13 million containers of copier consumable supplies and, when faced with the potential requirement of roughly just 50,000 containers under the resultant contract, will have to pass on to the Government the high costs for special marking. In this instance, the Government stands to pay more - probably much more - than the rest of the marketplace for items which, aside from the special marking, are standard commercial products.

Comment: Enforcement of this provision causes enormous disruption to a packaging and labeling process common throughout commercial industries and demands costly changes. The contract in question represents a minor portion of the vendor's government business which in turn represents a minor portion of overall (government and commercial) business. Yet, a perfectly acceptable commercial product has to be "made to order" for a government account.

Example 3:

A certain Government requirement for an automated distribution system sought solutions from commercial sources and stipulated proven "off-the-shelf" hardware. However, when the RFP was released, it was full of MIL-STDs, process reviews and approvals; for example:

> ". . . compliance of all production systems with the specification, which will incorporate the Government-directed changes that have been identified as part of the contract and the final production baseline. Technical management and control of hardware and software design shall be accomplished IAW MIL-STD, etc."

The Government added manufacturing controls, baseline management, a cost-schedule control system and cost estimating requirements. Most commercial vendors could not comply and did not bid. The two that did, did so through systems integrators who have Government financial and manufacturing controls in place. The acquisition took over one and one-half years.

Comment: This is an excellent and not uncommon illustration of what happens when the Government mixes two incompatible procurement strategies within the same system acquisition. By definition, an off-the-shelf product offering cannot meet build-to-specification requirements.

Example 4:

FAR 52.246-2, among other things, gives the Government the right to dictate the inspection system a contractor must provide and maintain. When applied to Government acquisition of commercial products, this provision is very disruptive, burdensome and has a dollar impact on the contractor's manufacturing process and quality control system.

In November 1986, one of our members suggested regulatory changes to the FAR Council which would encourage contracting officers to rely on a commercial contractor's existing inspection system when procuring commercial or "off-the-shelf" supplies. It took until April 1989 (or two and one-half years) for the proposed change to be even published for comment! As we sit here today, three

and one-half years later, a final rule has still not been published. This is not the way to unburden and streamline the Government acquisition of commercial products.

Comment: We use this illustration to point out the difficulty of eliminating a requirement that is impeding the adoption of commercial procedures.

Example 5:

In a competitive acquisition of off-the-shelf computer equipment by a civilian agency, the specifications contained a requirement that the items supplied be a particular color. The winning vendor's entire product line comes off an assembly line in one standard color (but not the required color!). After award, the vendor had to send the equipment side panels designated for Government delivery to a local shop to be repainted to the conforming color.

Comment: Again, another example of a gross distortion of normal commercial manufacturing procedures.

COMMENTS ON COMMERCIAL ACQUISITION INITIATIVES

In its invitation to testify, the Subcommittee requested CBEMA's comments on S. 1957, The "Nondevelopmental Items Acquisition Act of 1989," and on other proposals under consideration by the Congress to remove impediments to the acquisition of commercial products by federal agencies, including CBEMA's recommendations for improvements in the operation of the Multiple Award Schedules administered by the General Services Administration.

S. 1957

CBEMA subscribes to the principle that procurement legislation should be kept to the minimum required to define and implement a change to public policy. While the Senate was discussing legislation which eventually became Sec. 824 of the FY90-91 Defense Authorization Act, CBEMA was concluding a year-long effort to draft the statutory language our Association believed was needed to point the FAR System toward greater use of commercial solutions and simplified commercial product practices. The full text of that draft is attached (See Attachment Three). We find it convenient to use a summary of this effort as criteria against which S. 1957 can be measured:

Measurement	Does S.1957 meet this criterion?
There must be a presumption in law that a commercial solution is obtainable unless there are compelling reasons for not doing so. (See note #1)	Yes, with modification
When a commercial solution is sought, the requirements shall be stated so as to achieve full and open competition, as mandated by law.	Yes
An adequate data base must be developed and maintained to assist procurement officials in market research. (See note #2)	No
A government-wide training program in commercial contracting acquisition methods must be instituted.	Yes
A simplified contract form must be mandated.	Yes
Contracting officers shall not require cost or pricing data from offerors when adequate price competition exists.	Yes

When market research and acceptable pricing methods are insufficient, and cost or pricing data is deemed necessary, the data requested shall be limited to the minimum data required. (See note #3)	No
A continuous feedback system between industry, the Administration and the Congress must be established and maintained to monitor the progress of commercial contracting reforms. (See note #4)	Yes, with modification

A "yes" next to a criterion indicates CBEMA believes that S. 1957 will meet industry's expectations. The other notations require a comment.

Note 1: A preference for "commercial solutions:

The term, "nondevelopmental item" (NDI), is the term preferred by Congress so as not to inadvertently bias the procurement process against thousands of U.S. manufacturers who build to order or specification. CBEMA accepts the term in the context in which it is used but recommends that "commercial" products be recognized as the equal of "NDI" rather than a subset because commercial products are developed and marketed within an entirely different industry environment than are non-developmental items.

At a point early in the procurement process, NDI and commercial offerings will invariably follow separate and different evaluation steps in the execution of an acquisition plan. In fact, to accommodate both, S. 1957 might be more correctly titled, "The NDI and Commercial Items Acquisition Act of 1989." In general, commercial items, as defined by S. 1957, should not require vendor-supplied data to establish fairness and

reasonableness of price. The reason for this is that such data is usually available in published schedule contracts, or through commercial marketing publications. Consider the following illustration:

> The Navy requires a ruggedized workstation. Their requirement can be met by procuring a non-commercial workstation developed two years earlier for the Air Force and still in use. The item can be acquired using NDI procurement procedures and source selection criteria will include significant weighting of technical factors.
>
> An alternative and (we believe) preferred acquisition plan would be to state the requirements in functional terms to allow up-to-date commercial technology to be brought to bear on the problem in a fully competitive procurement. While this procurement plan would most certainly result in acquiring the workstation at lowest total overall cost, the Government contracting officer might also have to request cost or pricing data from the NDI offeror to support his determination of price reasonableness if no useful data is available through public sources.
>
> Although the nondevelopmental item by its very nature may be subjected to a requirement for cost or pricing data and other certifications, it should be entirely capable of competing with commercial products in any given procurement action.

Note 2: Data bases in support of marketing research:

Without a data base, market research is reduced to inefficient search methodologies that are constrained by time and resources. In commercial industries, the existence of data bases to aid in market research varies with the size of the company or importance of the product line. We believe that the Government is perfectly capable of accomplishing market research and has the obligation to do so. If the Congress is serious about providing strong, clear direction in the use of commercial practices, it must also provide guidance on the development of useful data bases for market research and identify the funding necessary to support this development.

Note 3: How much and what kind of cost or pricing data:

In addition to the CBEMA study on commercial acquisitions, other industry groups, such as Commercial Product Acquisition Team (COMPACT) and the Paperwork Reduction Act Reauthorization Coalition, drafted instructions or algorithms intended for use by contracting officers when some quantity of cost or pricing data was required. Absent such guidelines, these working groups came to the common conclusion that a contracting officer would invariably ask for more data from commercial vendors than was reasonable or available. There was general agreement that price comparisons should use the following progression:

Federal Supply and Multiple Award Schedules
or similar competitive Government prices

"Based-on" comparisons to FSS/MAS prices

Industry publications

"Based-on" commercial product pricing certifications

Offerors' directly pertinent sales data

Note 4: Continuous feedback loop:

Various proposals to increase the use of commercial products and practices call for progress reporting to the Congress. What is equally vital is a continuing exchange of ideas and successful methodologies between industry, the purchasing agencies and the Congress with a method to insert new ideas or technologies into the system in a timely manner. Consequently, a "clearing house" function should be established.

Defense Management Improvement Act

Industry is often criticized for not stepping up to the plate on issues relating to acquisition reform. We do not believe that any such criticism can be made regarding industry's efforts on commercial products.

Industry has devoted substantial resources over a number of years to identify genuine impediments to the acquisition of commercial products and propose concrete solutions. These include, for example, an analysis of the FAR system (Attachment Two) a draft commercial products bill (Attachment Three), and extensive participation in a Council of Defense and Space Industry Associations (CODSIA) project to analyze impediments to commercial acquisition as part of the Defense Management Review (CODSIA Case 22-89, Attachment Four).

In September 1989, the Undersecretary of Defense for Acquisition invited CBEMA and other participating CODSIA associations to submit their recommended FAR changes as part of the Defense Management Review (CODSIA Case No. 22-89). CBEMA chaired a group working on FAR Chapter 11, Acquisition and Distribution of Commercial Products. The CODSIA case was a massive effort involving over 100 participating defense industry companies and nine trade associations. Most of the participants were disappointed that DoD took no significant action on scores of major recommendations. We now see some of these items discussed in the CODSIA case being proposed as changes to the Code of Federal Regulations;

however, not in the form presented by the CODSIA group.

In submitting changes to FAR Chapter 11, we concluded that the FAR language, with respect to commercial and non-commercial specifications, was adequate but widely ignored ("...restrictive provisions or conditions be used only to the extent necessary to satisfy minimum needs."). Again, this points to an overall lack of strong and clear direction in the FAR system as the rules are applied to commercial contracting practices. In spite of this observation, the CODSIA case did not recommend legislative change mainly because many of the proposed changes are within the scope of current DoD authority, should they choose to exercise it.

The only response that to date attempts to address industry's on commercial acquisition input is Section 824 of the DoD Authorization Act, thanks to the effort of Senators Levin and Cohen of this Subcommittee.

No changes have occurred to the FAR, nor have we even seen the proposed regulatory implementation of your efforts. Instead, we now have the DMR package, which, except for a couple of examples, addresses a variety of issues which simply have not been consistently identified by industry as impediments to the acquisition of commercial products. For example, CBEMA's commercial products bill did not seek to alter current laws requiring competition, socioeconomic and preference programs, or the current protest processes.

We find the lack of progress on previously identified impediments both frustrating and disappointing, and urge the Congress to intensify its efforts. S.1957 should serve as the nucleus of that effort.

Multiple Award Schedule (MAS) System:

The Subcommittee is aware that CBEMA has long been an advocate for reform of the MAS system and increased use of this economical and efficient contracting method. In January of this year we joined with other industry associations at a GSA-hosted conference to discuss the improvement of the MAS system. As the Congress, DoD and other federal agencies strive to harness the benefits of the commercial marketplace, it would be useful for us in concert to examine once again the value of the MAS system and convert its shortcomings to advantages.

The point of the MAS is to allow federal agencies to order standard commercial products. The benefits of commercial contracting to the Government, and the need for greater Government efforts to tap these benefits have been recognized by the Grace Commission, the Packard Commission and other major studies. The current MAS policy, however, prescribes contracting for commercial products and services without standard commercial terms, and without using standard commercial negotiating techniques. Under these constraints, many of the benefits of commercial contracting are lost. GSA could achieve many of these benefits by unburdening itself of many of the MAS policies it now enforces, and

adopting a more commercial approach to contracting for these products. We have attached our most recent position on premises for developing a Multiple Award Schedule policy (See Attachment 4).

In describing the shortcomings of the MAS system as it is currently administered, one must make a distinction between the ordering process and the negotiation and award process. The ordering process is simple and approximates the methods used in commercial ordering. Negotiating and complying with MAS contract administration requirements are anything but simple and it is here that we direct our comments today. Consider the attempts of one of our members to "commercialize" the MAS negotiation:

> In April 1987, inspired by the many Commission Reports and Congressional hearings addressing the adoption of simplified commercial contracting procedures, one of our member companies prepared an "alternate" contract proposal to submit along with the usual annual response to the GSA MAS request for proposal. The alternate proposal said, if GSA would accept a version of the offeror's commercial contract form, modified to include certain FAR clauses required by law, the vendor would significantly reduce prices below what GSA could expect to negotiate using their usual terms and conditions. GSA dismissed the offer out-of-hand, stating that it did not have the authority to negotiate and, even if it did, the risks to the Government were unacceptable.
>
> For the next two annual cycles, the vendor repeated the offer. To add credibility, he subjected the proposed contract form to independent review and indicated to GSA the subject areas open to discussion or modification. Other trade groups and industry coalitions sought industry consensus for similar initiatives. Just this past month a model commercial contract form with broad industry support was released by a coalition known as COMPACT (Commercial Product Acquisition Team).

But, as we speak, there is no change to the status quo, no planned discussions or dialog with GSA and no "contract test" program to see if

there was any real savings in the vendor's offer.

A second example illustrates how inflexibility in applying contract clauses can lead to absurdity:

> Since passage of the 1988 amendment to the Buy American Act (41 USC 10a-10d)), CBEMA has proposed to OFPP a "substantial transformation" alternative to the "rule of origin" as defined in the Buy American Act (BAA) and incorporated into the regulatory implementation of the Trade Agreements Act (Pub. L. 93 Stat. 144 et seq.), as amended). Under BAA criterion, at least 50% of a product's component costs must be of domestic origin. The 1988 amendment directed OFPP to conduct an assessment of the current "rule of origin" and alternatives to that current rule, including an alternative based on a "total cost" method. OFPP is in the process of evaluating this and other alternatives.
>
> In its FY91 MAS RFP released last February, GSA notified offerors that products that could not meet the current BAA-TAA 50% test or claim one of the exclusions from the test, could not be included in a vendor's offer. Not only is the enforcement of the current BAA-TAA 50% test inconsistent with the intent of Congress as expressed in the Trade Agreements Act, but it also discriminates against U.S. manufactured products. Consider the following example:
>
> > An end product manufactured in Japan (a designated country under TAA) from components that are 100% from South Korea (a non-designated country under the TAA) becomes a designated country end product. In a procurement of that item by the U.S. Government agency, the item is treated as the equal of a domestic end product, with no restrictions as to federal procurement, if over the TAA dollar threshold (currently $172,000)
> >
> > By contrast, the very same end product manufactured in the U.S. from 51% Japanese and 49% domestic components is not treated as either a domestic end product or a designated country end product and consequently cannot be

procured at all by the Federal Government, if over the TAA dollar threshold.

The logical and businesslike treatment of the "rule of origin" controversy would have been to refrain from imposing a BAA-TAA exclusion on MAS bidders until OFPP published its guidelines in response to Congress' direction to do so.

CBEMA's first recommendation with respect to MAS improvements is that it be more precisely identified in the FAR as a competitive procurement vehicle. Recall at the opening of our statement that we identified the lack of commercial practices in government procurement to be a result of no strong and clear direction in the FAR system. Although the MAS is a valuable procurement tool for both Government and industry, it is not recognized as such. We believe that one of the root causes of this misconception is that the MAS program suffers from a lack of strong GSA executive direction. As a result, Congress does not understand the MAS program and, therefore, does not appreciate its value.

There is general agreement within the information systems industry that revisions to the current MAS policy are necessary. We believe that previous efforts to update the policy to the satisfaction of both Government and industry failed, in part, because fundamental policy issues were not addressed at the top levels within GSA. We urge you to recommend to GSA that the Agency take aggressive action to remedy this situation because Congress strongly supports the MAS program and considers it an excellent procurement vehicle to emulate commercial contracting practices within the guidelines outlined in S. 1957.

Secondly, Congress should encourage the Administrator to appoint a Program Manager or Special Assistant to the Administrator to serve as the executive director of the MAS program. This individual would function as an advocate for the MAS program and have a lead role in redefining MAS policy after full consideration of all legal, end-user and industry perspectives.

Summary and Conclusions

CBEMA's membership and the Congress share a common goal: To institutionalize commercial contracting practices, consistent with existing law. Today, we have expanded on a number of themes as they relate to this goal:

- Many commercial companies are working hard to introduce meaningful procurement reforms in the federal procurement system.
- There is no "perfect" procurement system. The commercial marketplace offers the best model for improvement. The faster Congress moves the federal procurement system towards commercial practices, the more efficient and effective the system will become.
- Congress is the logical change agent for reform, but should strive to do so using minimum intervention and only at the public policy level.
- Many of the requirements currently imposed on commercial vendors simply do not fit the commercial business model. Doing business under the current rules forces the commercial vendor to distort his commercial operations and over time makes federal government business unattractive.

- In the commercial marketplace, marketing research is a universal requirement that makes the buyer responsible for establishing or determining price reasonableness, not the seller, as federal rules demand. In the federal procurement system, the contracting officer is capable of doing marketing research and must be required to do so.

Congress and industry cannot permit the lack of acceptable progress in past attempts at procurement reform to dilute our future efforts. We believe that S. 1957, the bill we have discussed today, is an excellent vehicle to begin this renewed effort.

We recognize the tremendous effort made by the DoD in every section in the Defense Management Improvement Act. We urge that each topic be accorded its proper hearing in light of our comments here today and the intent of S. 1957, and not be rejected without a clear outline of a more sensible alternative.

CBEMA remains convinced that the Multiple Award Schedule system remains the best in-place system for widespread commercial procurement reform and thus deserves the Subcommittee's full attention and support as you continue your deliberations on S. 1957 and supporting legislation.

On behalf of all the members of the Association, and others in our industry who share our goals, we thank you for the opportunity to appear here today.

Attachments:

1. CBEMA Membership List

2. Problems Related to Sales of Commercial Products to the Federal Government

3. Draft Bill, dated April 26, 1990

4. CODSIA Case 22-89, FAR Chapter 11

5. Premises for the Development of MAS Policy

CBEMA

Attachment One:

**1990 MEMBERS OF THE
COMPUTER AND BUSINESS EQUIPMENT
MANUFACTURERS ASSOCIATION**

3M
AMP Incorporated
Amdahl Corporation
Apple Computer, Inc.
AT&T
Bell & Howell
Bull Information Systems
COMPAQ Computer Corporation
Control Data Corporation
Dictaphone Corporation
Digital Equipment Corporation
Eastman Kodak Company
Fujitsu America, Incorporated
Hewlett-Packard Company
Hitachi Computer Products (America), Inc.
Honeywell Keyboard Division
IBM Corporation
ICL, Incorporated
Information Handling Services
Multigraphics, A Division of AM International, Inc.
NCR Corporation
Panasonic Communications and Systems Company
Philips Business Systems, Inc.
Sony Corporation of America
Tandem Computers Incorporated
Tektronix, Incorporated
Texas Instruments Incorporated
Xerox Corporation

(1/12/90)

Computer and Business Equip. Manufacturers Assn. 311 1st St., N.W.,#500, Wash. D.C. 20001 (202) 737-8888 Fax: (202) 638-4922

Attachment Two:

Problems Related to Sales of Commercial Products to the Federal Government

Introduction and Summary

The Computer and Business Equipment Manufacturers Association ("CBEMA") is a national organization composed of manufacturers of computers and business equipment. (A list of members is attached to these comments.) Members of the Association are the leading manufacturers of automatic data processing equipment in the world, and sell billions of dollars of ADPE to the federal Government each year. CBEMA makes the following comments concerning problems related to sales of commercial products to the federal Government to the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs.

CBEMA believes that the current procurement environment systematically discourages the Government from purchasing and vendors from offering the readily-available commercial products that would meet the mission needs of federal agencies. Government procurement officials do not know how to do market research, find it safer to use tested forms and specifications, and too often require pricing data if there is any doubt. Commercial products vendors typically must tailor either their products or their way of doing business, or both, in order to sell to the federal Government. The result is greater reluctance of vendors to sell to the Government, reduced competition in federal procurement, and, ultimately higher cost to the Government.

Two principal areas of action deserve the Committee's attention in changing the procurement environment to make it easier for the Government to purchase and manufacturers to sell commercial products:

-- Make Government Procurement of Commercial Products Easier:

  - o Improve training and market research support for contracting officials, to change the culture of government procurement;

  - o Provide incentives to encourage procurement of commercial products;

-- Make Sales of Commercial Products to the Government Easier:

  - o Reduce the extra burden on commercial products manufacturers of selling to the Government by

removing or replacing inapplicable contract clauses and paperwork requirements, and increasing use of commercial contracting clauses; and

- o Recognize in procurement rules the realities of the commercial market place, where new products are routinely introduced and priced.

A. Make Government Purchases of Commercial Products Easier.

Government procurement officials are generally conscientious and work hard to meet the mission needs of their agencies while seeking to protect the government and the taxpayer. However, a number of inter-related factors create a procurement culture which has the result of discouraging the purchase of commercial products to meet mission needs. First, it is safer for procurement officials to follow what has already been tried and proven. The officials can stick to what they already know, and there is less chance of second-guessing by superiors. Second, procurement officials have little experience in ferreting out what is really available in the market and at what prices. They may know what consultants, salesmen and bidders tell them, but they do not have experience in conducing original market research. The system currently does not encourage it and probably discourages it.

Thus, the system encourages uses of specifications that have been used before or that carefully cover every detail of a product, rather than specifications taking into account what is standard in the market. Similarly, determining mission needs by an inward examination is encouraged over including in that examination the relevant products available in the market. And, even where commercial products are purchased, the system encourages buying what has been bought before over purchasing new products which the Government has not previously used.

This culture extends down into the design of major government systems, particularly in cost-based contracts. Again, it is simply easier and safer for the agency to use components that have been used before, or to specify every detail of every component, than to design for use of commercial products. This is what the system understands. The result is a specially designed computer or case or cable when minor changes not affecting mission needs would have allowed purchase of standard commercial products, typically at a much lower cost. Indeed, a number of inter-related factors have created a status quo where acquisition of commercial products is systematically disfavored. The current procurement culture should be changed, in part by improved training in commercial product procurement.

Although the shortfall of commercial products acquisition is Government-wide, the Packard Commission in 1986 specifically found a need for substantially increased procurement of commercial products by the Department of Defense. But as stated in the Defense Management Report to the President, issued by Secretary of Defense Cheney in July, 1989, "it is apparent that the Packard Commission's recommendations intended to make more fundamental changes in the defense acquisition system than have yet been accomplished. Additional actions are required--including steps that substantially depart from or go well beyond DoD's and Congress' efforts to date." Report, at 8.

CBEMA agrees and believes that one of the actions required is to dramatically change the current Federal procurement culture. Two key steps are significant mandatory training of procurement officials and creating incentives to purchase commercial products and disincentives to purchase non-commercial products.

1. Training and Market Research

In-depth training in the acquisition of commercial products should become an integral and mandatory part of the career and professional development of Government personnel involved in procurement decisions. An important component of this training should be instruction in the methods that the private sector employs in purchasing and selling commercial products and the techniques for conducting market research. The goal should be to make government procurement officials knowledgeable about and comfortable with commercial procurement techniques and market research. One result of a significant training effort should be to change the culture of Government procurement in order to make commercial product acquisition and market research a common and expected activity.

As a corollary to training, it may be appropriate to develop a Government-wide database of commercial product vendors by general product category, and ensure that all practical steps are taken to consult available sources about commercial products prior to developing product specifications for use in a procurement solicitation. Currently the Government collects data about product sources in a number of different programs, but none of this information is readily available Government-wide. By building from the existing efforts, a Government-wide database should help make market research an easier and accepted practice as well as help vendors make the Government aware of this products.

2. Provide Incentives for Procurement of Commercial Products.

CBEMA suggests that the Committee consider creating incentives to favor acquisition, when appropriate, of commercial products. A statute could create a presumption in procurements under the Federal Acquisition Regulations to purchase commercial products, unless there are compelling reasons found for purchasing non-commercial products. This presumption would allow the Government to benefit from the greater efficiency, higher quality, and lower price of market-proven products.

Use of these presumptions would alter the status quo by placing a burden on agencies which wish to avoid purchasing commercial products to explain their reasons. When good reason exists for not purchasing commercial products, such as when the needs of the agency can be met only by non-commercial products, the agency would simply have to present its justification. The presumption in the Competition in Contracting Act ("CICA") against the use of sole-source contracts is an example of a similar statutory presumption that is already in place.

In creating any such system of incentives to procure commercial products, the Committee should consider steps to assure that sub-contractors as well as prime contractors will supply commercial products to the maximum feasible extent. For instance, where an agency approves a subcontract, the presumption of purchase of commercial products could apply to the prime contractor's decision whether to use commercial products. In addition, contracting officers could consider as a factor in evaluating offers the prime contractor's intent to use and/or supply commercial products to the maximum extent feasible to meet the needs of the Government.

B. Make Sales of Commercial Products to the Government Easier.

1. Acquisition of Commercial Products Should Increasingly Use Commercial Contracting Clauses.

In order to achieve CICA's goal of achieving full and open competition in Government procurement, it is important to identify barriers that needlessly prevent suppliers from bidding for contracts. A host of specialized clauses and practices have developed in the federal procurement system that differ substantially from normal commercial practice, particularly under the Uniform Commercial Code. These Government-only clauses and practices have largely developed in the cost-based, specification-driven environment that has characterized Government contracts. In many instances, they not only burden

vendors but also provide less protection to the Government itself.

CBEMA believes that a careful evaluation of these clauses and practices is appropriate as the Government seeks to take increasing advantage of the cost savings and quality gains available from commercial products. The time may have come for a systematic review of the appropriate form of contract for acquisition of commercial products. This review would include areas ranging from major problems to minor annoyances arising from Government practices which differ significantly from commercial practice. Some examples are: inspection; expenses and implied warranties; responsibility for subcontractors; modifications and change orders; handling of rejected supplies; risk of loss; invoicing; labeling; and force majeure.

Even the well established Government contracts disputes procedure requires commercial vendors to operate differently and at greater cost than in normal commercial practice. Failing to write the correct government official at the right time or to write instead to an obscure board, following the directions of the wrong government official or writing the correct letter at the wrong time can all be very costly to vendors when doing business with the Government. And, change of the procedures of a business system established to sell in commercial markets is expensive. Given the risks, complications, and costs, commercial vendors are leery of the Federal marketplace.

Unnecessary agency requests for cost and pricing data pose perhaps the greatest obstacle to the participation of commercial products suppliers in Government contracts. Current law provides that cost and pricing data "need not" be required where the price is based on "adequate price competition" or "established catalog or market prices of commercial items sold in substantial quantities to the general public." 41 U.S.C. 254(d). In practice, the experience of CBEMA members is that agencies often request cost and pricing data even where the statute indicates that it is not necessary -- another example of how the entrenched culture of procurement disfavors use of commercial products. Furthermore, agencies often do not even use the data.

For many suppliers of commercial products, providing cost and pricing data requires a major, substantial overhaul of their internal accounting system, at great cost. The cost of this overhaul is so substantial that a significant number of bidders forgo bidding rather than providing the data. This problem could be addressed by clarifying that "adequate price competition" exists, and cost and pricing data should not be requested, when "competitive procedures" are used under 41 U.S.C. 5403. A procedure could also be developed for clarifying when cost and

pricing data is or is not appropriate for other procurements that do not use "competitive procedures." In this way, market prices for commercial products can be accepted by the Government, without imposing needless burdens on potential bidders, and without risk of extra cost to the Government.

Although CBEMA thus favors an intensive review of Government contracting clauses and practices that disadvantage commercial products, a commercial products bill would not seem the appropriate vehicle for addressing the extra burdens that socio-economic contracting clauses place on government contractors. Many of the related laws already apply to commercial product manufacturers. Further, these socio-economic issues include all Government contracts, not merely contracts for the supply of commercial products, and therefore should be considered in that light.

2. The Full Range of Commercial and Commercial-Type Products Should be Made Available to the Government.

Any effort to eliminate barriers to Government acquisition of commercial products should address the realities of the commercial marketplace in which the introduction of new products and discontinuance of old is an on-going activity. Treatment as commercial products should be accorded new commercial products and to commercial-type products that are modified, discontinued, or otherwise identified differently, but have substantially the same performance and functional characteristics as their normal commercial counterparts. The current Government procurement environment leads to rigid definitions and distinctions among types of products, creating significant complications and costs for commercial product manufacturers trying to meet Government needs.

Especially in the fast-changing computer industry, the constant introduction of new products can pose unnecessary problems under current rules. New products are often difficult to bid because pricing data is not available yet from the marketplace, and no substantial quantity has yet been sold to the public, even when it is clear that a substantial quantity will soon be sold. The Government is reluctant to buy these products because they may not exactly fit old specifications and, in any event, will not do so without an extraordinary amount of paperwork by the vendor. As a result, the Government often cannot take advantage of new technology as it first appears in the commercial marketplace. Treatment as a commercial product should be given for products that the supplier produces to sell to the general public in the course of normal business operations at prices based on established catalog or market prices.

Unnecessary paperwork such as cost and pricing data should similarly not be required of other commercial-type products. For instance, legitimate mission needs or over-detailed Government specifications may require modification of commercial products. These should be treated as commercial products if they have substantially the same performance and functional characteristics as the commercial counterpart. In addition, the Government sometimes seeks to continue to acquire products that were previously purchased but sales of which have subsequently been discontinued in the commercial marketplace. A product that has been so discontinued by a manufacturer should be recognized as a commercial product if, during some period of time, it would have met the definition of commercial product, and it is still available to the Government.

Conclusion

CBEMA appreciates the attention the Committee is devoting to the important issue of fostering acquisition of commercial products by the federal Government. As described above, the difficulties of commercial product procurement created by the current procurement culture should be addressed by improved training of procurement personnel. Incentives should be created to favor the purchase of commercial products, increased use should be made of commercial contracting clauses, and the full range of commercial and commercial-type products should be made available to the Government.

Attachment Three:

April 26, 1990

A BILL

To improve the economy, efficiency, and effectiveness of Federal procurement by enhancing the opportunity for the Government to acquire commercial products.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled.

Section 1. That this Act may be cited as the "Commercial Products Acquisition Act of 1989."

Section 2. Findings and Purposes.

(a) The Congress finds that the economy, efficiency, and effectiveness of product acquisition by the executive agencies would be improved if they purchased commercial products available in the commercial market whenever such products will satisfy agency needs. Many of the specifications and other requirements heretofore included in Government solicitations and contracts, such as design specifications, state needs that are unnecessarily unique to the Government and unrelated to or inconsistent with commercial standards. These specifications and requirements result in additional costs to the seller of the products as well as the agency buying them. As a result, many sellers of commercial products do not compete for Government contracts, and the Government is unable to take advantage of the vigorous competition, large economies of scale, short delivery times, market-driven efficiency, technological innovation, and high-quality products that are available in the commercial market.

(b) The purpose of this Act is to: require executive agencies to acquire commercial products except where compelling circumstances are found; reduce the paperwork associated with submission of cost and pricing data for commercial products; and develop a form of standard contract for government procurement of commercial products.

Section 3. Definitions.

(a) "Commercial product" means a product, such as an item, material, component, subsystem, or system, or service sold or traded to the general public in the

course of normal business operations at prices based on established catalog or market prices.

(b) "Commercial-type product" means a modified commercial product, a new commercial product, a commercial product discontinued by the manufacturer, or a product otherwise identified differently from its normal commercial counterparts. Unless specifically stated otherwise, all references to "commercial product" in this Act shall be construed also to refer to "commercial-type product."

(c) "Modified commercial product" means a product which varies from a commercial product in one or more items, materials, components, or subsystems, but which has substantially the same performance and functional characteristics.

(d) "New commercial product" means a product which the supplier produces with the intention of selling or trading it to the general public in the course of normal business operations at prices based on established catalog or market prices.

(e) "Commercial product discontinued by a manufacturer" means a product that during some period of time would have met the definition of "commercial product" and is still available to the government, but is no longer being sold as a commercial product by the manufacturer.

(f) "Product otherwise identified differently from its normal commercial counterparts" means that a product that would otherwise be considered a "commercial product" will be considered a "commercial-type product" if the identification of the product differs from its normal commercial counterparts but it does not substantially differ in performance and function.

(g) "Non-commercial product" means a product that is neither a commercial product nor a commercial-type product.

(h) "Commercial product procurement action" means any procurement action which specifies the purchase or offer of commercial products, any acquisition of commercial products, and any offer or proposal to supply commercial products by an offeror, contractor or

subcontractor, including commercial products offered or acquired in connection with changes or modifications.

Section 4. Presumption for Commercial Purchases.

(a) In order to benefit from the greater efficiency, higher quality and lower price of market-proven products, the presumption in procurements under the Federal Acquisition Regulations shall be to purchase commercial products, unless there are compelling reasons found for purchasing non-commercial products. Unless a justified exception is approved under subsection 4(b) the stated requirements for such procurements shall be described in a manner that will achieve maximum full and open competition, as mandated in 10 U.S.C. §2305(a) and 41 U.S.C. §253(a).

(b) The head of an agency may acquire non-commercial products (whether constituting all or a part of a procurement) only when--

(1) the needs of the agency can be met only by non-commercial products and no combination or alteration of commercial products will satisfy the needs of the agency except at a greatly increased life-cycle cost to the Government, with cost and all other relevant factors considered;

(2) the agency's need for the products is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to purchase non-commercial products;

(3) it is necessary to purchase non-commercial products in order to meet the purposes set forth in 41 U.S.C. §253(b)(1);

(4) the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of the procurement of the products for such government, have the effect of requiring the purchase of non-commercial products;

(5) a statute expressly authorizes or requires that the procurement be made through another agency or from non-commercial products;

(6) purchase of commercial products would require disclosure of the agency's needs so as to compromise the national security; or

(7) the head of the agency--

(A) determines that it is necessary in the public interest to purchase non-commercial products in the particular procurement concerned, and

(B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

(C) The authority of the head of an agency under this paragraph may not be delegated below the senior procurement executive of the agency designated pursuant to section 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. §414(3)) (without further delegation).

(d)(1) Except as provided in paragraph (2), the head of an agency shall not award a contract for non-commercial products unless--

(A) the contracting officer for the contract justifies in writing the purchase of non-commercial products including the use of any specifications other than functional specifications, an identification of the statutory exception from the presumption of purchasing commercial products, and a description of any market survey conducted or a statement of the reasons a market survey was not conducted, and certifies the accuracy and completeness of the justification; and

(B) the justification is approved--

(i) in the case of a contract for an amount exceeding $100,000 (but equal to or less than $10,000,000), by the head of the procuring activity or a delegate who, if a member of the armed forces, is a general or flag officer or, if a civilian, is serving in a position in grade GS-16 or above under the General Schedule (or in a comparable or higher position under another schedule); or

(ii) in the case of a contract for an amount exceeding $10,000,000, by the senior procurement

executive of the agency designated pursuant to section 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. §414(3)) (without further delegation).

(2) In the case of a procurement permitted by subsection (b)(2), the justification and approval required by paragraph (1) may be made after the contract is awarded. The justification and approval required by paragraph (1) is not required--

(A) when a statute expressly requires that the procurement shall be made for a non-commercial product;

(B) in the case of a procurement permitted by subsection (b)(7); or

(C) in the case of a procurement conducted under (i) the Act of June 25, 1938 (41 U.S.C. §46 et seq.), popularly referred to as the Wagner-O'Day Act, or (ii) section 8(a) of the Small Business Act (15 U.S.C. §637(a)).

(3) Where an agency approves a subcontract, or the procurement of any part of an item, material, component, subsystem, system, or service, the requirements of this Section shall apply to such subcontract or item, material, component, subsystem, system or service. In addition, contracting officers shall consider as a factor in evaluating offers the prime contractor's intent to use and/or supply commercial products to the maximum extent feasible to meet the needs of the Government.

(4) The justification required by paragraph (1)(A) and any related information shall be made available for inspection by the public consistent with the provisions of section 552 of title 5.

(5) In no case may the head of an agency--

(A) enter into a contract for non-commercial products on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions; or

(B) procure non-commercial products from another agency unless such other agency complies fully

with the requirements of this chapter in its procurement of such products.

The restriction contained in clause (B) is in addition to, and not in lieu of, any other restriction provided by law.

Section 5. Assistance to Agencies. In order to assist executive branch agencies in implementing this Act:

(a) Improved Market Research. In order to improve the quality of market research in government contracts, and to encourage the participation of small and disadvantaged business enterprises in government procurement, within twelve months of the date of enactment of this Act, the OFPP shall (1) develop and implement a government-wide database of commercial product vendors by general product category and (2) report to the Committee on Government Affairs of the Senate and the Committee on Government Operations of the House of Representatives on the implementation of the database and recommendations as to further actions necessary for improved market research. In designing and implementing the database, the OFPP shall take maximum account of and make maximum use of existing government efforts to gather such information, and should ensure that the database will be available to all contracting officers for use in market research. The database shall not act in any way as a qualified vendors list that would exclude vendors not on the list, and OFPP shall develop a mechanism by which potential vendors can easily be included in the database. The OFPP shall identify market research resources now available, as well as examine ways to expand market research capabilities if existing resources are determined to be inadequate for the development of a useful database. The OFPP, in conjunction with the FAR Council, shall implement regulations which require procuring agencies to perform market research, including the search of the OFPP data base described herein, prior to developing product specifications for use in a procurement solicitation.

(b) Improved Training in Purchasing of Commercial Products.

(1) Each executive branch agency shall make in depth training in the acquisition of commercial products an integral part of the career and

professional development and education of its management officials in general and supply and logistics managers, contracting officers, acquisition managers, and related staff in particular.

(2) Within six months of the date of enactment of this Act, the Administrator of OFPP shall develop guidance for the executive agencies in the conduct of such training to carry out the purposes of this Act and shall submit to the Committee on Government Affairs of the Senate and the Committee on Government Operations of the House of Representatives such guidance and recommendations as to further actions as may be necessary to carry out the training required under paragraph (1). Such guidance shall set forth standards and objectives for such training and its content, including such topics as the methods that the private sector employs in purchasing and selling commercial products and the techniques for conducting market research. The training by executive branch agencies required by paragraph (1) shall be consistent with such guidance.

(3) Such guidance and recommendations shall be developed in consultation with the Office of Personnel Management, the Federal Acquisitions Institute, the Defense Systems Management College, and any additional agency that the Commercial Products Advocate in OFPP deems suitable.

Section 6. Simplifying Purchases of Commercial Products. In order to simplify the purchase of commercial products and, thus, enhance the ability of vendors to compete to sell commercial products to the Government:

(a) Within twelve months of the date of enactment of this Act, the OFPP shall develop a new, simplified form of contract to be used in all Government purchases of commercial products.

(1) The new form of contract shall contain terms normally used in the purchase and sale of commercial products to the extent consistent with the needs of the Government and exclude those clauses normally included in Government contracts which are not required by law and which are unnecessary for the purchase of commercial products by the Government given

competition in the commercial marketplace. In particular, clauses should be excluded that involve paperwork determined to be unnecessary for purchases of commercial products.

(2) Paragraph (1) notwithstanding, the new form of contract shall not exclude clauses mandated for inclusion in particular procurements by the Competition in Contracting Act or by other laws.

(b)(1) For the purposes of 41 U.S.C. §254(d), there shall be an exemption on the basis of "adequate price competition" from the requirement for submission of cost or pricing or sales data from offerors, contractors, and subcontractors in commercial product procurement actions under "competitive procedures," as defined in 41 U.S.C. §403, when the agency obtains more than one proposal or bid in response to its procurement solicitation. Contracting officers shall not request cost or pricing data from offerors, contractors or subcontractors when the "adequate price competition" exemption applies.

(2) For commercial product procurement actions under other than "competitive procedures" or when the procuring agency fails to obtain more than one proposal or bid--

(A) the contracting officer shall determine that a price is reasonable if such price is less than or equal to the price for the same product as listed on a federal supply schedule (including multiple award schedule) containing such commercial products; or

(B) if a product is not on a federal supply schedule (including multiple award schedule), the contracting officer shall verify the reasonableness of the proposed price according to the following order of precedence:

(i) the contracting officer shall determine if the price is reasonable based on the federal supply schedule (including multiple award schedule) price for similar products;

(ii) if no federal supply schedule (including multiple award schedule) price exists for similar products, the contracting officer shall perform market research and obtain prices through established

industry publications or otherwise for the same or similar products from competing vendors; or

(iii) if the contracting officer is unable to determine the reasonableness of the proposed prices after completing bona fide attempts to obtain comparable prices in the commercial or Government markets, the offeror, contractor or subcontractor shall certify that the prices offered are prices based on established catalog or market prices for sales in significant quantities in the commercial market.

(C) In determining price reasonableness under this paragraph, the contracting officer may make reasonable adjustment of prices so as to allow for differing terms, conditions, products and quantities set forth in the agency's procurement solicitation.

(3) In preparation for or the conduct of price negotiations by the government for commercial product procurement actions, any request for data submissions from offerors, contractors, or subcontractors shall be limited to directly pertinent sales data regarding commercial market contracts, terms, and conditions which are comparable to the contractual relationship that would exist in the contemplated government contract.

(4) The foregoing notwithstanding, data submissions under 41 U.S.C. §254(d) shall not be required in a commercial product procurement action if the price of the contract to the United States is expected to exceed five hundred thousand dollars ($500,000).

(c) Within six months of the date of enactment of this Act, the OFPP shall develop and provide policy guidance to Federal agencies emphasizing that requirements shall be stated in the form of functional needs rather than design specifications.

Section 7. Effect on Competition in Contracting Requirements. Nothing in this Act shall excuse an agency from compliance with other statutes and regulations requiring competition in federal procurement.

Section 8. Report by the Office of Federal Procurement Policy.

(a) The Commercial Products Advocate of the Office of Federal Procurement Policy shall submit to the Committee on Government Operations of the House of Representatives a report on the actions taken by the executive branch agencies to carry out the requirements of this Act. Such report shall include--

(1) a description of the steps taken by the Office of Federal Procurement Policy and other executive branch agencies to carry out the provisions of this Act, and an analysis of the effectiveness of such actions;

(2) a description of principal laws, regulations, and procedures which prevent or restrict purchase of commercial products to the full extent contemplated by this Act; and

(3) such recommendations for additional legislation as the Commercial Products Advocate considers necessary or appropriate to promote maximum procurement of commercial products to fulfill the supply requirements of the Government, including but not limited to additional legislation to implement improved training in procurement of commercial products and improved market research for commercial products.

(b) The report required by paragraph (a) shall be submitted before the end of the eighteen-month period beginning on the date of the enactment of this Act.

Section 9. Report by the Comptroller General.

(a) The Comptroller General shall submit to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives a report on the actions taken by the Office of Federal Procurement Policy and by the other executive branch agencies to carry out the requirements of this Act. Such report shall include--

(1) an analysis of the effectiveness of the actions taken by the Office of Federal Procurement Policy and by the other executive branch agencies to carry out the requirements of this Act;

(2) an analysis of the implementation of the commercial products database and the training programs pursuant to Section 5 of this Act;

(3) a description of the steps taken by executive branch agencies to carry out the provisions of this Act, and an analysis of the effectiveness of such actions; and

(4) an analysis of the report prepared by the Commercial Products Advocate of the Office of Federal Procurement Policy, required by Section 8 of this Act.

(b) The report required by paragraph (a) shall be submitted before the end of the two-year period beginning on the date of the enactment of this Act.

Attachment Four:

CODSIA Case 22-89: FAR Chapter 11

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS (CODSIA)

1722 Eye Street, N.W., Suite 300
WASHINGTON, D.C. 20006

(202) 457-8713

September 29, 1989
CODSIA Case 22-89

The Honorable John A. Betti
Under Secretary of Defense for
Acquisition
The Pentagon, Room 3E933
Washington, D.C. 20301-3000

Dear Mr. Betti:

The undersigned member associations of the Council of Defense and Space Industry Associations (CODSIA) are pleased to respond to your request for industry participation in the Defense Management Review (DMR) Regulatory Relief Task Force. We endorse your efforts to reform the burdensome and confusing procurement regulations and directives that unnecessarily complicate the procurement process, restrict the flexibility and authority of government and industry acquisition personnel, and increase the cost of products and services procured by the Defense Department.

In CODSIA's view, regulatory reform must entail nothing less than a sweeping overhaul based on a radical departure form past policies and practices. This is essential if DoD is to become a world class customer. The enclosed recommendations for improving the Federal Acquisition Regulation (FAR) and the Defense FAR Supplement (DFARS) were prepared with the understanding that this is an initial input to a sweeping, zero-based overhaul and that we will be able to supplement this with more substantive analyses in the months ahead. We have focused on those regulations which impose unnecessary costs on the procurement process, discourage sound business practices, inhibit procurement of commercially available products, and negatively impact the financial well-being of the defense industry.

The DMR instructed the regulatory task force to "assess the process by which guidance is developed, issued, and disseminated, and recommend changes to ensure that future such guidance is held to the minimum required." This is vital because defense contractors operate in a unique marketplace where the customer is also the regulator. The procurement changes of recent years have been implemented on a piecemeal basis without sufficient industry involvement. These regulatory changes have had a substantial adverse impact on the financial health of the defense industrial and technological base and have adversely affected DoD and its mission requirements. Policy decisions with major financial and operational impacts on the defense industry should not be made

without thorough analysis, including open and detailed discussions with suppliers that will be affected by proposed policy changes. We have suggested a number of ways to facilitate this dialogue and improve the management of the regulatory system.

In order to meet the September 29th deadline established by your August 24th letter we have limited our initial review to major issues in the FAR and the DFARS. Over the coming months we plan to pursue a phase II effort aimed at:

- Developing the enclosed recommendations in greater detail;
- Providing additional recommendations for changes in the FAR and DFARS. The enclosed recommendations are by no means all inclusive. We strongly support the concept of a "zero-based" review and agree that each regulation should be reviewed and either justified or eliminated;
- Recommending reforms in the Service and Command level regulations and clauses;
- Examining representations and certifications. There has been a proliferation of these requirements in recent years. They require an inordinate amount of time and effort. Each should be carefully examined and justified; and
- Analyzing regulatory thresholds. While we have examined a few of the nearly 500 different regulatory requirements tied to dollar thresholds, this area deserves a more comprehensive review. In general, we believe the thresholds should be raised to account for the effects of inflation. There should also be more uniformity in the application of thresholds. Higher, more uniform thresholds would reduce the administrative burden imposed on both the DoD and its contractors.

The CODSIA effort to develop the enclosed recommendations involved gaining a consensus among nine associations representing thousands of companies. The one month provided for our participation allowed little time for a complete substantive review and analysis, and does not do justice to the bold approach initiated in the DMR. This extremely important, highly complex undertaking can only be successful if it is based on thorough analysis and an in-depth dialogue between DoD and industry representatives. We urge you to continue to invite industry participation in the Department's regulatory reform efforts over the coming months.

32-427 0 - 90 - 5

In anticipation of this continued relationship, we have established a CODSIA DMR Regulatory Review Task Group. We would be pleased to meet with you at your earliest convenience to discuss ways of structuring our continued involvement in the regulatory review. In addition, we look forward to participating in the November 8 meeting of the Task Force to discuss our enclosed recommendations.

Sincerely,

Wallace H. Robinson, Jr.
President
National Security Industrial Association

John L. Pickitt
President
Computer & Business Equipment Manufacturers Association

Don Fuqua
President
Aerospace Industries Assn.

Jean A. Caffiaux
Senior Vice President
Electronic Industries Assn.

J. Richard Iverson
President
American Electronics Assn.

Mark Schultz
President
Professional Services Council

Kenneth McLennan
President
MAPI

John F. Stocker
President
Shipbuilders Council of America

Gary D. Engebretson
President
Contract Services Association

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FAR/DFARS PART 9 - CONTRACTOR QUALIFICATIONS

ISSUE:
FAR 9.4 Debarment, Suspension, and Ineligibility, does not state that present responsibility is the sole basis for suspension/debarment nor does it require agencies to give contractors an opportunity to tell their side of the story prior to the suspension decision.

DISCUSSION:
The Government's right to protect itself from irresponsible contractors must be balanced against the rights of contractors to good faith dealings with federal agencies. As the Packard Commission wrote in its June 1986 final report to the President: "Suspension and debarment should be applied only to protect the public interest where a contractor is found to lack "present responsibility" to contract with the federal government. Suspension and debarment should not be imposed solely as a result of an indictment or conviction predicated upon former (not ongoing) conduct, nor should they be used punitively."

Under current procedures, the rights of the government and the rights of industry have not been balanced appropriately and the suspension and debarment process is sometimes unfair. This contributes to an adversarial relationship between DoD and industry.

RECOMMENDATION:

Amend the FAR:

- To specify that a lack of present responsibility is the sole basis for administrative suspension or debarment.
- To specify that factors such as indictment, conviction, breach of contract, voluntary disclosure, and corporate self-governance are relevant to, but may not be determinative of, a contractor's present responsibility.
- To require that whenever the Government is considering suspension or debarment, the contractor shall first be advised of the contemplated action, and shall be given an opportunity to make a presentation as to its present responsibility.

FAR/DFARS PART 11 - ACQUISITION AND DISTRIBUTION OF COMMERCIAL PRODUCTS

ISSUE 1:
Presumption for Commercial Products

DISCUSSION:
The FAR System relegates commercial solutions to a secondary role "whenever these products ...adequately satisfy the Government's needs." Specifically FAR Part 7, Acquisition Planning, does not direct or emphasize the need to consider the capabilities of the commercial marketplace. Use of Government specifications (FAR Part 10) in many instances limits the Government's ability to purchase commercial products. FAR Part 11, Acquisition and Distribution of Commercial Products, among other things, requires consideration of "all responsible sources" whether or not a source competes in a commercial marketplace.

RECOMMENDATION:
Change the overall FAR focus from commercial products to commercial solutions. Establish in the FAR System a presumption that a commercial product solution exists for every Government need, unless there are compelling reasons found for purchasing non-commercial products. While FAR Part 11 should remain the reference for commercial acquisition policy, definitions and evaluation guidelines, the entire FAR document and supplement must be infused with the principle that a commercial solution exists. Every appropriate section of the FAR should contain guidelines that maximize the acquisition of commercial solutions and encourage the use of commercial practices.

ISSUE 2:
Commercial terms and conditions

DISCUSSION:
Major differences exist between commercial terms and Government contract terms used in the FAR and applied to the acquisition of commercial products. The areas of greatest difference include:

- Price and payment terms
- Inspection, acceptance and return of goods
- Warranties
- Limitation of liability
- Taxes
- Software and data rights
- Termination

RECOMMENDATION:
Establish a standard Government contract format using commercial terms and conditions for acquiring commercial products. Maximi-

the use of commercial terms and conditions, and commercial practices, used in Uniform Commercial Code.

ISSUE 3:
Determining "commerciality"

DISCUSSION:
The FAR guidelines contained in Parts 11 and 15 are very narrow in scope when defining commercial products. In addition, Part 15 contains substantial barriers to the ability of commercial companies to do business with DoD. Unless fundamental changes are made, DoD will continue to be excluded from the ability to procure modern state-of-the-art technologies readily available in the commercial marketplace.

RECOMMENDATION:
The "based on" concept in determining commerciality should be broadened. The regulations should only require that the contractor demonstrate commercial marketplace acceptance for the same, similar or functionally comparable product. The regulations should consider commerciality in qualitative terms so that contracting officers, in conjunction with their technical advisors, have the flexibility to analyze comparable functionality of products in the commercial marketplace.

In addition, the extremely narrow definition of a commercial product in FAR Part 15 needs to be substantially revised. The test for substantial sales to the general public should not be a proportional test. The FAR also needs to be revised to recognize the commerciality of discontinued products, new commercial products, modified or "militarized" commercial products, and intra-company transfers. The "based on" concept should be broadened to recognize sufficient similarity to commercial products rather than requiring products be virtually identical. The concept should recognize predecessor products, allow predicted sales analysis to be used for justifying commercial sales, and provide for the introduction of new technology.

ISSUE 4:
Training and market research

DISCUSSION:
In prescribing policies and procedures for acquiring commercial products, FAR Part 11 requires that market research and analysis be conducted in order to determine whether there are commercial products that meet the Government's functional requirement. Although FAR 11.004 provides direction to agencies on the kind of research and analysis that should be conducted in the course of evaluating available products, it does not sufficiently detail the degree and extent of market research that should be conducted. Further, acquisition personnel have not been

adequately trained to perform the kind of research needed to enable the Government to make informed judgments on the acceptability of one or more company's commercial products. To compensate for this lack of training and expertise, acquisition personnel invariably extract and use cost or pricing data from the vendors to determine price reasonableness.

RECOMMENDATION:
For successful, cost-effective acquisition of commercially available products, it is essential that agency acquisition personnel be trained and proficient in commercial market research and analysis.

Given the statutory preference for commercial products, the FAR should be revised to provide policy guidance for the development and implementation of comprehensive training programs for acquisition personnel in market research methods and techniques. To carry out the requirements of FAR 11.004(b) and (c), training should include:

- Research and analysis techniques employed by industry procurement personnel when purchasing commercially available products,
- Use of vendor-furnished literature containing product descriptions, performance information, design characteristics, and prices,
- Use of information contained in industry trade journals and periodicals,
- Attendance at vendor-sponsored product/technology announcements and product seminars that are available to the general public, and
- Attendance at industry trade shows and expositions.

In addition to personnel training, a Government-wide data base of commercial product vendors by general product category should be developed for use by appropriate agency personnel in developing product specifications for inclusion in solicitations.

ISSUE 5:
Improper reliance on price competition

DISCUSSION:
The implementation of the FAR System and supporting dispute resolution processes have improperly focused on price competition to the exclusion of technical, management, and other factors relevant to the acquisition of commercial products and services.

RECOMMENDATION:
FAR Chapters 7 (planning), 10 (specifications), and 11 (commercial acquisition) should give full and equal status to technical, management, and other factors that bear on source selection of commercial products and services. Terms used to describe these factors, such as "best value" and "life-cycle costs," must be clearly defined to be consistent with Competition in Contracting Act requirements so as to enforce the legal permissibility and intent for evaluating all specified evaluation factors, not just low price.

ISSUE 6:
Use of functional specifications

DISCUSSION:
FAR Part 11 requires the acquisition of commercial products to be conducted so as to maximize competition. FAR Part 10, Specifications, applicable to commercial and non-commercial product acquisitions alike, further directs that restrictive provisions or conditions be used "only to the extent necessary to satisfy minimum needs." In fact, these instructions are widely ignored. Government solicitations use restricted specifications that limit competition, preclude the use of commercial solutions and often result in protests and lengthy dispute resolutions. Current FAR Part 10 language limits the amount of commercial solutions that can be proposed.

RECOMMENDATION:
FAR Part 11 should be expanded to include guidance on the use of the "purchase description," using a revised definition in FAR Part 10. FAR Part 10 also should reference the use of voluntary industry standards when considering commercial solutions, as opposed to DoDISS and other detailed design specifications. Language should be developed to provide that detailed design requirements necessitate a justification and approval under FAR Part 6.

Attachment Five:

PREMISES FOR DEVELOPMENT OF MULTIPLE AWARD SCHEDULE (MAS) POLICY

- Multiple Award Schedules represent a convenient, economical, and efficient method for procuring the Government's smaller requirements

- MAS is one of several procurement vehicles:

    - There are alternate acquisition methods which will attain the lowest possible price, because of terms and conditions

    - MAS contracts should contain Maximum Order Limitations, which are effective vehicles for segregating the MAS program from a more advantageous method of procurement.

    - MAS should be non-mandatory (the contracting officer should be free to by-pass MAS and use the open market when perceived advantageous)

- MAS should emulate commercial practices to the maximum extent possible

- Prices established by a free, open and competitive marketplace (test of commerciality) are deemed to be fair and reasonable prices

    - MAS pricing objective should be a fair and reasonable price: that is, the best price under similar terms and conditions and similar class of purchaser (i.e., dealer vs. end user)

    - GSA should use commercial practices to negotiate the most favorable price available without imposing extraordinary burdens on contractors

- MAS acquisitions by definition are competitive

    - Any responsible, responsive vendor should be able to get on schedule (more contractors equal more competition)

    - Competition on MAS is a principal cause for reduction of MAS price

- MAS contracts only establish prices, terms and conditions

    - Government agencies act as many customers, each having specific requirements

    - MAS contractors must perform all marketing functions associated with the commercial marketplace

- A policy, determined at product classification level, better reflects commercial practices for that product class.

Administrator
General Services Administration
Washington, DC 20405

June 20, 1990

The Honorable Carl Levin
Chairman, Subcommittee on
Oversight of Government Management
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Mr. Chairman:

Thank you for your letter of May 15, 1990, requesting responses to certain follow-up questions to the testimony given by me and Mr. Richard Hopf before the Senate Subcommittee on Oversight of Government Management at its hearings on S. 1957, a bill to increase the purchase of commercial products by civilian agencies.

Because the nature of the questions pertain to acquisition policy and regulations, I asked the Associate Administrator for Acquisition Policy, who is responsible for such matters in the General Services Administration, to prepare complete responses. I have enclosed the responses to your questions that he prepared. If you have any questions concerning the attached responses, please call me to discuss them further.

Sincerely,

Richard G. Austin
Administrator

Enclosure

THE SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
APRIL 26, 1990 HEARINGS ON S. 1957
FOLLOW-UP QUESTIONS

1. QUESTION -

"(1) Last year's Defense Authorization bill included a provision requiring that the regulations implementing the Truth in Negotiations Act (TINA) be revised to ensure that TINA requirements are applied in contracts for commercial products only when necessary to protect the government's interest in obtaining a fair price. Do you support this revision?"

ANSWER -

The Federal Acquisition Regulation (FAR) requires contracting officers to obtain certified cost or pricing data in negotiated procurements only where statutorily prescribed exemptions do not apply. With respect to one of those exemptions - "established catalog or market prices of commercial items", contracting officials have the discretion to apply the exemption or in the alternative, obtain a waiver. Nonetheless, it would appear that, in certain cases, cost or pricing data has been obtained under circumstances where there is a rational basis to conclude that information relating to a product's cost elements is not necessary for support in determining price reasonableness in negotiations. Contracting officers may have been reluctant to exercise the judgment and discretion afforded by the regulation or confused by the requirements of the FAR. GSA believes that the regulation is in need of clarification. We also believe that certain key concepts need to be emphasized and others revised. Accordingly, GSA supports a revision to the FAR as suggested by the subcommittee. GSA has actively participated with the Department of Defense (DOD) to accomplish this end.

A revised FAR should assure that contracting officers are fully aware of the extent of their authority and the types of judgments that can be made to grant exemptions from the requirement for submission of certified cost or pricing data for commercial items. The FAR changes, which DOD and GSA are preparing jointly, should also make clear to contracting officers that, for certain negotiated commercial product procurements, it is the preferred practice of the Government to attain adequate price competition or to make determinations that certified cost and pricing data is not required. We believe that these changes will have a significant impact on reducing the number of cases where contracting officers require cost or pricing data.

We also believe that these changes will preserve and enhance our ability to negotiate good prices for the commercial products bought by the Federal Government.

It is GSA's practice to use price analysis techniques to the maximum extent practical and not to use cost analysis or obtain cost data except where absolutely necessary to protect the Government's interests. To implement this approach, we grant exemptions from the requirement to submit certified cost or pricing data whenever the circumstances of the acquisition permit. For an item to qualify for an exemption from the requirements to submit certified cost or pricing data on the basis of commercial catalog or market sales, there must be substantial commercial sales. This means that there will be evidence of the impact of market forces on the sales price of the item. The normal form this evidence takes and the information which we solicit from these commercial companies is sales information and discount information. We believe that this type of information provides the best opportunity for us to obtain favorable pricing. We believe price data is more meaningful and allows us to negotiate lower prices than could be negotiated if we relied on certified cost or pricing data.

2. QUESTION -

"(2) The regulations implementing the Truth In Negotiations Act exemption for commercial products established percentage requirements for certain categories of sales, such as sales at catalog prices. In your view, can a small commercial company that does not maintain a published price list qualify for the exemption under the regulations as currently drafted?"

ANSWER -

Yes. A small commercial company can qualify for an exemption. The FAR contemplates just such a situation. FAR 15.804-3(c)(1) defines "established catalog prices" as follows:

> "Established catalog prices must be recorded in a form regularly maintained by the manufacturer or vendor. This form may be a catalog, price list, schedule, or other verifiable and established record. The record must (i) be published or otherwise available for customer inspection and (ii) state current or last sales price to a significant number of buyers constituting the general public."

The FAR does not require that a company publish a catalog such as those commonly associated with mail order companies or require that a catalog or price list be distributed to a mailing list in order to meet the criteria for the exemption. The FAR only requires that a record of the price must be in some reviewable form and the form of the price record must be available for customer inspection. Thus, in the case of a small company which does not publish a price list, the company would qualify as long as its sales prices were recorded somewhere, such as in a computer or on the products themselves (in the manner of a grocery store) and those sales are substantial.

During the subcommittee hearing, Senator Cohen asked whether his father, who is a baker and well-known in the community, would be able to sell his bread to the Government even though he had no formal catalog. GSA responded in the affirmative. The Senator's father, like most bakers, undoubtedly posted his prices on the wall of the store, maintained a pricing sheet behind the counter, or stamped the price on the package. In our view, any of these price records would meet the criteria for an exemption based on an established catalog or market price. However, as with the discussion of any hypothetical example, we must be careful to point out other important qualifications affecting the discussion. In particular, we do not want to give the impression that these rules apply to small purchases. In fact, the FAR and the TINA do not require certified cost or pricing data for acquisitions under $100,000 and prohibit obtaining certified cost or pricing data for acquisitions under $25,000. Thus, unless the Government were buying more than $100,000 worth of bakery goods from the Senator's father, the requirement would not be applicable.

In a related matter, there appeared to be a misunderstanding as to the nature of catalog price during the subcommittee hearing. In those cases where a company uses a catalog to market its products to the general public, such a catalog is often used as the basis for offers to the Government. The offered price from such a catalog may be the list price or may be expressed as a discount from the list price. Sales made in either case are considered catalog sales. The FAR contains a percentage test for sales at catalog price to ensure that the catalog price, whether at list price or discounted from list price, is the baseline used by a firm in pricing its sales to the general public. Such information is necessary for granting an exemption from the statutory requirement for certified cost or pricing data based on a catalog price. The granting of an exemption, if the contract price of an item is based on the catalog price

(i.e., a list price or discount from list price), also assures the Government that the offered price for an item is from a price record normally used by the firm as the baseline for its discount practice, or is a discount from that price record. In this regard, GSA's experience is that use of the catalog or price list technique does not present a problem.

A company may also meet the criteria for an exemption from the requirement to submit cost or pricing data without a catalog, price list, schedule, or other price record maintained by the firm, so long as the offered price is based on a market price. To meet this aspect of the exemption, the FAR requires that to qualify for an exemption based on an "established market price," the prices must be established in the course of ordinary trade between buyers and sellers free to bargain and the prices can be substantiated from sources independent of the offeror. Normally, a market price requires that the product is generic, as in the case of basic commodities or raw materials, and not unique to a particular seller.

As an aside, related to the definition of a catalog, questions have arisen indicating that there is some doubt as to the necessity of having a catalog or price list in order to qualify for an exemption in cases where there are substantial non-catalog sales of an item to the general public. Two points come to mind in considering these concerns.

First, and most important, the requirement for a price to be based on a catalog price as a condition for granting an exemption is a statutory requirement. The TINA states that an exemption may be granted for a commercial item "...where the price is based on...established catalog or market prices...". Thus, unless an item is a market item, such as wheat or oil, which have prices verifiable through third parties, the statute only permits exemptions to be granted for commercial items if the items are catalog items.

This raises the second point. Why does the TINA permit these exemptions to be granted for catalog items? TINA requires certified cost or pricing data to be obtained in order that the Government will have sufficient information with which to negotiate a fair and reasonable price unless better information is available. Certified cost or pricing data is intended to place the Government on an equal footing with the contractor with regard to cost of performance so that a good estimate of cost can be determined and a fair profit set. This approach acknowledges that there are no

market forces at play which would otherwise determine the sales price of an item and that actual cost plus a fair profit is the surrogate of a price set by market forces. However, when market forces are present, TINA defers to those market forces and does not require certified cost or pricing data to be obtained. TINA acknowledges that reliance on market forces to determine a price is superior to reliance on a surrogate of market forces (i.e., cost data). These market forces are present in Government procurements in the form of adequate price competition or through use of catalog or market prices of items sold in substantial quantities to the general public.

3. QUESTION -

"(3) The Computer and Business Equipment Manufacturers' Association (CBEMA) testified that it had a short form contract that would substantially reduce paperwork requirements and result in lower prices on the multiple award schedule. A copy of this short form contract is enclosed.

- In your view, would the CBEMA approach require less contractor documentation than current GSA requirements? What documentation is currently required by GSA that would not be required under the CBEMA approach?

- In your view, would the CBEMA approach provide the government with adequate information to negotiate a fair price? What is the purpose of the documentation that is required by GSA but not by the CBEMA approach?

- Would you support use of this short form contract for your agency? Why or why not?"

ANSWER -

The CBEMA "short form" contract is similar to a proposal previously submitted by one of GSA's suppliers. The document was provided as an "alternate" proposal in response to a multiple award schedule (MAS) solicitation for automated data processing equipment (ADPE) and software covering the Government's requirements for fiscal year 1990. A similar "alternate" proposal was submitted in response to the MAS solicitation for ADPE and software for fiscal year 1991. To summarize, the proposal would delete numerous clauses currently found in MAS contracts, suggests a different approach to pricing than that currently used and eliminates certain information required by GSA to support its pricing objectives. In submitting the "alternate"

proposal, the company estimated a "cost savings" of $18 million if the "alternate" proposal was adopted. Recognizing the potential savings, the GSA contracting activity responsible for the procurement of commercial ADPE and software made a comparison of prices offered under the "alternate" proposal with the prices obtained using the current GSA method for negotiating MAS contracts. Specifically, the GSA contracting activity compared the company's discounts offered in the "alternate" proposal with actual discounts in the company's MAS contract for fiscal year 1990. Similarly, a comparison was made between the discounts in the company's "alternate" proposal for fiscal year 1991 and the actual discounts on the company's MAS contract for fiscal year 1990. In the latter case, negotiations for fiscal year 1991 are in process. The comparison of the discounts in the fiscal year 1990 "alternate" proposal with the actual discounts in the fiscal year 1990 MAS contract indicated less favorable prices in the "alternate" proposal and would have resulted in a "loss" to the Government of $17.9 million. While the fiscal year 1991 "alternate" proposal is somewhat improved over the fiscal year 1990 proposal, in terms of the discounts offered, it still would result in a substantial "loss" situation when compared with the fiscal year 1990 MAS discounts under the company's contract. Our contracting activity has asked the company to provide the rationale for their estimate of $18 million cost savings. To date, the firm has responded that the evaluation factors underlying their proposal are complex. Because we have no basis for evaluating the "claimed" $18 million in cost savings, we are unable to provide the desired analysis of the "savings" associated with the CBEMA "short form contract" with the present MAS method in terms of the cost benefits resulting from such "short form contract." We would advise, however, that we are reluctant to alter our current approach to negotiating the MAS contracts unless we are assured that favorable prices can be negotiated.

With respect to your specific questions concerning the CBEMA "short form contract", we offer the following responses:

1. The GSA MAS program for commercial products does require the submission of certain information consistent with the FAR to support an exemption from the statutory requirement to obtain certified cost or pricing data based on a catalog or market price. Additionally, GSA obtains certain sales information to support its negotiation of prices under a MAS contract. The CBEMA proposal would eliminate the submission of this information. In lieu of the information, a simple certification is substituted. The proposal contains no documentation except for the insertion of discounts from

the company's price list and certain certifications. No other information is provided upon which to base MAS negotiations. GSA, on the other hand, requires certain sales and pricing data, information on published and unpublished discount practices to a firm's customers, the type of other allowances normally granted to a firm's customers, and information to judge whether differences between the discounting practices to its customers and the discount offered under the MAS solicitation are reasonable. Undoubtedly, the proposal would eliminate documentation. However, it would also impair GSA's ability to negotiate favorable prices for the taxpayer.

2. No. The information in the CBEMA proposal is insufficient for the Government to negotiate a reasonable price. In addition to the concerns cited in the preceding paragraph, the proposal would not provide information that the Government could use in its negotiations. In this regard, it should be noted that the information resulting in the Government's favorable pricing was required to be submitted in response to the MAS solicitation. Hypothetically, GSA would have negotiated discounts that were less favorable than the fiscal year 1990 MAS contract prices by $17.9 million if it had used the CBEMA approach. Additionally, the preaward audit, which uncovered other reductions from list price granted to the company's customers, would not be a feature under the CBEMA approach.

   The purpose of the information required by GSA but not in the CBEMA approach, is to assist GSA in the achievement of its negotiation objectives consistent with the GSA MAS policy. In its simplest terms, the Government's objective in negotiating price is to obtain the best price possible under the circumstances of the negotiation. Our current MAS policy provides that the Government intends to establish maximum and minimum negotiation objectives. The maximum objective is to achieve for the taxpayer the best price/discount that is available from a vendor for a particular item. We recognize, however, that such an objective is not always obtainable during the negotiation process. Accordingly, we establish a minimum objective which is a price below which an award will not be made. That which falls between the maximum and minimum pricing objectives is the matter for negotiation. The CBEMA approach would foreclose the opportunity which a contracting officer may have through the use of complete pricing information to negotiate a favorable price. It does disservice to the Government's goal to obtain the lowest overall price alternative to meet the needs of the Government. It

should be noted, however, that we are actively considering streamlining the process for acquiring commercial products.

3. The CBEMA "short form contract" offers a number of suggestions for critical evaluation of terms and conditions required by law or regulation. We feel that certain ideas are worth serious consideration in trying to simplify the process for acquiring commercial products to satisfy the Government's needs. A number of these ideas would be the subject for evaluation envisioned under S. 1957. Nonetheless, it should be noted that some deleted terms and conditions are not in the Government's interest. Other deletions are not consistent with established procurement policy. For example, it is unclear whether the proposal would require the submission of a small business and small disadvantaged business subcontracting plan. Such a plan would normally be statutorily required given the size of business and dollar volume of most MAS contracts. However, the proposal did not include a subcontracting plan. The proposal incorporates certain Federal Acquisition Regulation (FAR) clauses by reference and omits others. Additionally, the proposal incorporates certain representations and certifications required by FAR, excludes others and qualifies its certification concerning the Buy American Act and Trade Agreements Act. Further, the proposal seems to omit all GSA provisions and clauses designed to protect the Government's interest and permit the Government to effectively negotiate price. For example, the proposal contains no provisions that allow the Government to assure itself about the firm's pricing practices such as an audit clause or a price reduction clause for defective pricing information. The lack of such clauses coupled with no information on sales or pricing practices would pose problems for the Government. We would reiterate that based on GSA's experiences, a preaward audit is critical to the negotiation of favorable prices. Without such provisions and clauses, the Government would pay higher prices. Moreover, the proposal does not seem to be a good business deal for the Government given the terms and conditions that are incorporated in the proposal in lieu of the Government's terms and conditions. We recognize that, for the most part, such "seller" agreements do not favor the "buyer." For example, the proposal would price an order at a discount from a list price that is current at the time of the order by the Government. The Government has no protection against future price

increases. Additionally, the contractor would have the option of deciding whether it would accept the order from a Government agency. Lastly, the proposal seems to obviate any discussions that may have occurred before award.

There seems to be many unanswered questions that need further in-depth analysis before a conclusion can be reached on whether terms and conditions prescribed by law or regulation should be deleted, modified, or continued to be included in a Government contract for the acquisition of commercial products. We believe that one of the stated purposes of S. 1957 is to accomplish the necessary analysis and reach conclusions concerning the current terms and conditions. Such a review would be valuable and GSA would support it.

In summary, the principal thrust of the CBEMA proposal seems to eliminate the submission of information. We have a problem with such a proposal because of its adverse effect on the Government's ability to negotiate favorable prices. Accordingly, we cannot support such a proposal. CBEMA and others have indicated substantial "cost savings" would accrue if such a "short form contract" were adopted. Our contracting activity has requested a verifiable breakdown of such claims but has not received a response. We are somewhat skeptical that such savings would accrue to the Government, particularly after the analysis of prices under both approaches. We would welcome, however, the review of the existing terms and conditions used in the procurement of commercial products, giving consideration to commercial "buying" practices in major industries that could be applied successfully in Government procurements while assuring that fairness, efficiency and national interests are not sacrificed.

CBEMA

June 4, 1990

The Honorable Carl Levin
The Honorable William S. Cohen
Subcommittee on Oversight of
Government Management
Senate Governmental Affairs Committee
442 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Levin and Cohen:

The Computer and Business Equipment Manufacturers Association appreciates the opportunity you provided us to testify on S. 1957, your bill to increase the purchase of commercial products by civilian agencies. We are pleased that you have taken the lead in the Senate on reforming the policies governing the government's acquisition of commercial products.

The following answers are provided in response to your May 15, 1990 letter. Should you have any further questions, please feel free to call upon us.

Sincerely,

John L. Pickitt
President

Computer and Business Equip. Manufacturers Assn. 311 1st St., N.W.,#500, Wash. D.C. 20001 (202) 737-8888 Fax: (202) 638-4922

FOLLOW-UP QUESTIONS & ANSWERS
RELATING TO CBEMA TESTIMONY ON S. 1957
APRIL 26, 1990

Note: All three of the follow-up questions reference the example used in CBEMA's written and oral testimony in which a CBEMA member (Digital Equipment Corporation) attempted, in three successive annual proposals, to interest the GSA in an "alternate" response to the annual GSA MAS solicitation, based on a commercial contract form and offering significantly lower prices.

(1) Why would the price be lower under your proposed contract? Please be as specific as possible.

The proposed contract eliminated many burdensome clauses found in the standard GSA solicitation. The absence of these clauses would either reduce the contractor's operating costs or open new opportunities for increased business (revenue) under the contract.

Two of the eliminated clauses in particular, GSAR 552.215-70, Examination of Records by GSA and Price Reduction (GSA Policy Statement on Multiple Schedules (MAS Policy)), were identified by the offeror as responsible for much of the personnel and computer solicitation and management of the contract after award. The offeror estimates approximately 2% of contract costs attributed to price reduction compliance and administration could be saved by the elimination of these two clauses. (Note: Different vendors would arrive at different cost savings, depending on the impact of individual FAR clauses on their contract.)

The offeror also believes the Government would realize additional cost savings and the contractor would generate additional sales by using the proposed simplified commercial contract form in lieu of the usual MAS contract. Under the current MAS contract, prices are generally held constant by the contractor so as not to "disturb the relationship" and cause the Government to apply the price reduction clause. Under the simplified contract form, the contractor would be free to lower prices offered to Government customers in response to competitive pressures or other business reasons. The offeror estimates an additional annual savings to the Government of between one and two percent of contract value if these market forces were unconstrained. Both the vendor and the Government would share in these cost savings.

(2) What was in the four boxes of documents that would be required by the GSA contract and not by your contract?

The four boxes contained a total of ten large three-ring binders. The actual GSA requirement is for three sets of ten binders -- two for the GSA contracting officer and one for the auditor. The binders, in turn, contain materials and data necessary to respond to the GSA MAS solicitation. The ten binders are labeled as follows:

1. Solicitation document with appropriate responses, representations and certifications, and annual stockholder reports.

2. Terms & conditions for each type of sale or service.

3.&4. Government price list, including lease-to-ownership, hardware, package systems, software, and maintenance.

5.&6. Offeror's standard sales agreements, including stardard volume agreements, cooperative marketing agreements, OEM agreements, and educational institutional agreements.

7.-9. Commercial Price books, including maintenance services and volume agreements.

10. Miscellaneous (Discounts & Price Allovance policies)

By contrast, the "alternate" commercial contract referred to in the testimony was 35 pages. It contained all the terms and conditions including referencing 33 mandatory FAR clauses and eleven representations and certifications. Since this "alternate" contract was first offered in 1987, COMPACT (the Commercial Product Acquisition Team) published a sample form contract only 17 pages long. The only additional item necessary to use the contract is the contractor's price book, an inch-thick document.

(3) How could the Government's interest in achieving a fair price be protected without price data and without a price reduction clause?

(a) Price Data

The Government is not going to be "without price data" if it elects to adopt commercial contracting form and practice. It will have access to current and reliable data just as a purchasing officer in a commercial corporation is able to obtain good data in a timely and economical manner.

While the commercial contract form eliminates many terms and conditions not supported in law or necessary for contract performance, it does retain key certifications and audit rights. For example, the products sold under the MAS program are commercial products, which have been exempted from the requirements for certified cost or pricing data by virtue of their being "based on established catalog or market prices of commercial items sold in substantial quantities to the general public" (FAR 15.804-3(a)(2)). By definition, then, GSA already has the assurance that: (1) the prices are published in a catalog or price list regularly maintained by the vendor, which is publicly available and states the current sales price to a significant number of non-Government buyers, (2) the supplies or service are regularly sold or traded to the general public in the course of normal business operations, and (3) the quantities regularly sold to the public constitute a "real commercial market" (FAR 15.804(c)). Other important protections are discussed below.

A long-term solution to protecting the Government's interest will require a different match of human resources, database support and training. Since this type of an organization can only be achieved over time, an interim solution is required, using current, but abbreviated, methods to enable contracting officers to attain fair and reasonable prices.

The Government and vendor would negotiate a "class of customer" to serve as the basis for negotiation. The vendor would supply data for that class of customer only. A pre-negotiation review of an offeror's commercial practices and the practices of that industry would also help form the Government's negotiation objective. New or first-time offerors may require additional review, e.g., using a pre-award audit.

Post-award facts and data that have a bearing on fairness and reasonableness of price become a part of future negotiations.

If, after contract award, the price of an item is raised to the extent it exceeds the Government's idea of "fair and reasonable," the contracting officer has several options:

1. Restrict buying of that item by advising agencies that the same or similar item is available at a lower price from other sources, until competitive market forces cause the seller to lower the price,

2. Terminate the contract for convenience if a wide variety of prices increase beyond a reasonable limit,

3. Audit the vendor's SF 1412 disclosures. The offeror has certified as to the currency, completeness and accuracy of the information in his SF1412,

4. Invoke FAR 52.215-1, Examination of Records by Comptroller General, which provides access to all records "directly pertinent" to the contract,

5. Factor the new data or circumstances into the next round of negotiations to achieve price objectives that more accurately reflect market conditions, or

6. Shorten the period which prices will be in effect in anticipation of further price instability.

(B) Price Reduction Clause

The basis for MAS price negotiations is the "most favored customer" concept. This assumes that competition in the commercial marketplace establishes different price levels for different customers -- in general,

more sales to a customer mean higher discounts for that customer. Since competition is ongoing, these price levels will tend to fluctuate in a free market to seek the level appropriate to the market conditions existing at any given time. However, when the Government imposes an artificial price barrier in the form of a price reduction clause, the market cannot operate freely. The vendor will be inclined to hold prices constant so as not to "disturb the relationship" that existed at contract award and, if changed, would cause the Government to invoke the price reduction clause.

The price reduction clause places this kind of barrier on the government market. A commercial company with a GSA contract that contains a price reduction clause is forced to consider that impact everytime it faces a pricing decision. The following is an example:

A contractor's Most Favored Customer buys $500,000 annually and receives a 10% discount. The Government buys $2,000,000 and receives 20% discount (10% differential). During the contract period, for competitive reasons, the Most Favored Customer demands a 12% discount. In order to keep the business, the company might consider the additional 2% and give up the $10,000. However, the price reduction clause mandates that at the immediate time the government price reduces by $40,000. That decision is now a $50,000 decision and not a $10,000 decision, and would not happen. The next contract period, the government would identify this extra 2% as a negotiation objective. The difference is the contractor has the opportunity to not enter into a contract with the government, or to look for ways to budget for the additional discount cost. In any case, it is a know situation, not a precipitous action, in the middle of a contract period.

This scenario is repeated every day among government contractors. The price reduction clause actually works to constrain competition in the government marketplace. Consequently, it prohibits prices from seeking lover levels, and thereby negates the strategy of the governmetn to allow competition to lower prices on which they can negotiate. It is very difficult for companies to operate with a price reduction clause without limiting its offerings to the government, assuming a tremendous administrative burden, or violating at least the essence of the price redu tion clause.

The operative regulation that makes the Multiple Award System work in the best interest of the government is FIRMR 201-32.206(h): "If items are to be acquired under a GSA nonmandatory ADP schedule contract at other than the lowest delivered price for identical or similar items, under any GSA nonmandatory ADP schedule contract, an agency shall justify the action and shall retain the justification and supporting data, or submit them to GSA if a specific DPA is required..." (The FIRMR goes on to give examples of factors that may be used in support of a lowest overall cost justification).

If that process is enforced, the government will benefit from competition.

1. To be on the schedule, a company must negotiate a price that cannot be higher than established list price.

2. Prices must be negotiated against a policy of Most Favored Customer.

3. All previous year pricing policies must be specified.

4. Once the price is established and the contract is awarded, contractors must compete for orders against FIRMR 201-32.206.

If FIRMR 201.32.206 is adhered to, other "safeguards", such as the price reduction clause, and extensive sales and marketing data would be needless.

To summarize, commercial contract negotiation and management can be practiced in the Federal Government provided adequate tools and training are made available to negotiators for them to be able to identify and understand the risks inherent in commercial contracting and to minimize these risks insofar as the law and good business practices require them to do so.